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In the Supreme Court of the United States

OCTOBER TERM, 1986

PRESTON R. TISCH, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, PETITIONER

v.

DARLENE SHIDAKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
WM. BRADFORD REYNOLDS
Assistant Attorneys General
DONALD B. AYER
Deputy Solicitor General
JAMES M. SPEARS
MICHAEL CARVIN
Deputy Assistant Attorneys General
GLEN D. NAGER
Assistant to the Solicitor General
DAVID K. FLYNN
E. ROY HAWKENS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a plaintiff can state a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on alleged disparate impact resulting from a subjective promotion practice or procedure.

2. Whether a plaintiff in a Title VII action establishes that a promotion procedure is prima facie unlawful merely by showing that the employer promotes from within in filling upper level positions requiring managerial ability and other special skills and that a gross disparity exists between the percentage of females occupying those upper level positions and low-level positions in the employer's work force.

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No.

PRESTON R. TISCH, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, PETITIONER

v.

DARLENE SHIDAKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Preston R. Tisch, in his capacity as Postmaster General of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit denying rehearing en banc (App., *infra*, 48a-49a) is unpublished. The prior panel opinion of the court of appeals (App., *infra*, 1a-14a) is unpublished to date. The opinion of the United States District Court for the Northern District of Illinois (App., *infra*, 15a-47a) is published at 593 F. Supp. 823.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a-14a) was entered on January 29, 1986. A petition for rehearing was denied on May 1, 1986. On July 23, 1986, Justice O'Connor extended the time for filing a petition

for a writ of certiorari to and including September 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

42 U.S.C. 2000e-2(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-16(a) provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in the United States Postal Service * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

1. Respondent, Darlene Shidaker, served as acting postmaster and then as postmaster of a small post office in Kenilworth, Illinois from 1962 through 1982. During this time, she was in pay scale level-18. In 1977, the Postal Service advertised vacancies for three pay scale level-22

postmaster positions in other, larger post offices in Illinois. Respondent applied for all three positions. App., *infra*, 16a-19a.

Pursuant to its regulations, the Postal Service convened a Screening Board to assess all applicants for the three vacancies. The Screening Board reviewed each applicant's work experience, educational background, performance appraisals, capacity for growth, and potential in management problem solving, employee development and relations, budget operations, work supervision, and public and community relations. The Screening Board then eliminated applicants lacking minimal qualifications, ranked the qualified candidates by tallying point scores assigned them by each of the Board members, and forwarded the names of the seven highest ranked applicants for each vacancy to a regional selection manager. That manager added the candidates on the Screening Board's list to a list of Postal Service employees who, by regulation, had an absolute right to be considered for the vacancies. From the combined list, the manager recommended five to seven candidates for each vacancy to a Regional Management Selection Board. The Regional Management Selection Board interviewed and evaluated each of these candidates and then recommend a single person for each vacancy to the Postmaster General. The Postmaster General made the final appointments. App., *infra*, 19a-24a.

Respondent was the only female to apply for each of the three postmaster vacancies. She competed with 31 other applicants for two of those vacancies, and with 27 other applicants as to the third. The Screening Board found several instances of prior mismanagement in respondent's personnel history[1] and determined, based on her com-

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[1] Two members of the Screening Board had "first-hand knowledge of the conditions of the post office run by [respondent]. [Mr.] Wright, as a postal inspector, had investigated an instance of poor

posite personnel profile, that she was not among the top seven applicants for any of the available jobs.[2] Accordingly, respondent was not further considered by the Postal Service for the vacant positions and did not receive a promotion. Respondent, however, believed that the Postal Service did not promote her because of her sex and, after exhausting her administrative remedies, filed this Title VII action in the United States District Court for the Northern District of Illinois. App., *infra*, 19a-24a.

2. The district court conducted a full trial concerning respondent's claims (App., *infra*, 16a). Respondent produced evidence showing that the Postal Service had a policy of promoting from within and that an arguably significant disparity existed between the percentage of females occupying low-level and high-level positions in the Postal Service's work force (App., *infra*, 19a, 24a-25a).[3] The Postal Service responded with evidence explaining its

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security in connection with the issuance of money orders and he described [respondent's] management as sloppy. [Mr.] Wright * * * told the Screening Board that Christmas mail deliveries were two or three days late. [Mr.] Besteda also told the Screening Board that the Kenilworth post office was not well managed" (App., *infra*, 21a).

[2] The Screening Board ranked respondent thirteenth out of the 16 applicants that it deemed minimally qualified for the Glenview, Illinois postmaster position (App., *infra*, 21a). It ranked respondent sixteenth out of the 17 applicants that it deemed minimally qualified for the Palatine, Illinois postmaster position (*id.* at 21a-22a). And the Screening Board ranked respondent fifteenth out of the 17 applicants that it deemed minimally qualified for the Franklin Park, Illinois postmaster position (*id.* at 22a).

[3] Specifically, respondent introduced evidence showing that (App., *infra*, 36a-37a):

> In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5% by November 1980. Nationally, women held 11.5% of the positions at PES-15 and above in January, 1980.
>
> In 1978, the year of [respondent's] failed promotion, women occupied 23 of the 108 postmaster positions in the North Suburban

promotion procedures, the special skills and training that postmasters must have, the fact that postmasters (including respondent) have in the past been promoted both from within and without the Postal Service work force, and the reasons that respondent was not promoted to any of the three vacancies (App., *infra*, 16a, 19a-24a, 38a-43a). The Postal Service also argued that, since she had not identified a facially neutral selection device which had injured her, respondent had not raised a legally cognizable disparate impact claim (Tr. 24-26, 427-430, 447-449). Respondent countered that the Postal Service's "whole promotion procedure" produced the "disparate impact" (*id.* at 454). After hearing all of the evidence and the parties' arguments concerning it, the district court concluded that the Postal Service had not discriminated against respondent in its promotion decisions—under either a "disparate treatment" or a "disparate impact" theory (App., *infra*, 33a-43a).[4]

With regard to the "disparate treatment" issue, the court found that "[respondent] has not proved, by a preponderance of the evidence, that the Postal Service

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MSC, or 21.2% of the total postmaster positions. However, none of the women postmasters were rated higher than PES-20 and 15 of them were at level PES-15 or lower. Additionally in 1977-1978 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% [of those filling positions of PES-19 or higher] were rated in positions of PES-19 or higher.

[4] The district court also rejected respondent's claim that the Postal Service had retaliated against her in 1982—by reducing her in grade—for initially raising her Title VII claim in 1978 (App., *infra*, 43a-47a). The court held that the Postal Service had demoted her for "misfeasance and malfeasance and not in retaliation for * * * her civil rights claim" (*id.* at 46a-47a). The court of appeals affirmed (App., *infra*, 8a-14a). The retaliation claim has no bearing on the issues raised by this petition and, accordingly, we discuss it no further.

failed to promote her because she was a woman" (App., *infra*, 43a). The court said that the Postal Service had a "legitimate, nondiscriminatory business reason" for not promoting respondent—*i.e.*, that the three candidates actually promoted were either more qualifed or had higher composite Screening Board ratings than did respondent (*id.* at 38a, 41a). Finally, it found that "the procedure used by the Postal Service to initially select candidates for promotion was permissible and without overt indicia of discrimination" (*id.* at 42a).

With regard to the "disparate impact" issue, the court held that respondent had raised a legally cognizable discriminatory impact claim even though "the system attacked includes both objective and subjective parts" (App., *infra*, 35a). But the court also concluded that, where "management jobs which demand skills and training possessed by relatively few individuals" are in issue (*id.* at 37a), statistics showing a disparity—even a gross disparity—between the percentage of females in the lower and higher work force levels are not by themselves sufficient to establish discriminatory disparate impact (*ibid.*). Since respondent had not introduced evidence concerning the dates on which females had entered the Postal Service's work force, the number of females who had actually applied for promotions, the distribution of females by pay scale levels in the workforce, or the number of females who qualified for promotion, the court found her evidence of disparate impact wanting and granted judgment to the Postal Service on the disparate impact claim as well (*ibid.*).

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings (App., *infra*, 1a-14). The court agreed with the district court that respondent had not supported her allegations of disparate treatment (*id.* at 14a). However, the court allowed respondent to proceed on a disparate impact theory and

disagreed with the district court's conclusion that respondent had failed to support her disparate impact claim.[5] "Once [respondent] proved that the Postal Service promotes from within and introduced statistical evidence showing that there is a gross disparity between the percentage of women occupying lower level positions and upper level positions, she made a sufficient *prima facie* showing of discriminatory impact" (*id.* at 5a). Accordingly, the court remanded the case to the district court to allow the Postal Service to bring forward evidence "that few women occupying lower level positions have applied for upper level positions or are qualified for upper level positions, or to bring forward evidence of the job relatedness of its promotion standards" (*id.* at 7a).

REASONS FOR GRANTING THE PETITION

This case presents two questions of continuing importance in the administration of Title VII: First, whether a Title VII plaintiff can state a cause of action based on an alleged disparate impact arising from a subjective decisionmaking process,[6] and, second, whether a Title VII plain-

[5] The court of appeals did not explicitly address in its opinion whether respondent's challenge to the Postal Service's subjective, multi-component promotion procedure presents a legally cognizable disparate impact claim. But the Postal Service fully briefed the issue as an alternative ground for affirming the district court's judgment. See Brief for the Defendant-Appellee at 14-17 (filed May 3, 1985); see also Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc at 8-13 (filed Mar. 13, 1986). Thus, the Postal Service clearly raised the issue to the court below and, in deciding that respondent has in fact established a prima facie case of disparate impact, the court necessarily decided it.

[6] By "subjective decisionmaking process," we mean a decisionmaking process that is not exclusively comprised of "quantifiable or objectively verifiable selection criteria which * * * [can be] mechanically applied * * *" (*Zahorik* v. *Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984)). We discuss this definitional issue more fully (page 15, & n.15 *infra*).

tiff establishes a prima facie disparate impact claim when she shows that her employer promotes from within in filling upper level positions requiring managerial ability and other special skills and that a gross disparity exists between the percentage of females occupying those upper level positions and the lower level positions in the employer's work force. We submit that both questions warrant this Court's review.

1. As to the first question, the Postal Service argued to both the district court and the court of appeals that respondent had not raised a legally cognizable disparate impact claim since she did not identify an objective, facially neutral practice or procedure that served disproportionately to limit, segregate, or classify female employees. Respondent countered that it is permissible for her to attack the Postal Service's decisionmaking process as a whole, notwithstanding its subjective character. The district court agreed with respondent, holding that "discriminatory impact analysis may be applied here, though the [multi-component] procedure which is challenged consists of subjective parts" (App., *infra,* 35a). The court of appeals affirmed. The decision of the court of appeals here conflicts with the decisions of other courts of appeals and represents an incorrect and unworkable application of the disparate impact doctrine.

a. There is much confusion among the courts of appeals concerning whether a Title VII plaintiff can maintain a disparate impact cause of action without first identifying an objective employment practice or procedure that causes an alleged adverse impact. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 1288 (2d ed. 1983). The Second and Fourth Circuits have held that disparate impact analysis does not apply in challenges to subjective decisionmaking processes. See, *e.g., Rossini* v. *Ogilvy & Mather, Inc.*, No. 85-7776 (2d Cir. Aug. 14, 1986), slip op.; *EEOC* v. *Federal Reserve Bank,* 698 F.2d

633, 638-639 (4th Cir. 1983), rev'd on other grounds *sub nom. Cooper* v. *Federal Reserve Bank,* 467 U.S. 867 (1984); *Stastny* v. *Southern Bell Telephone & Telegraph Co.,* 628 F.2d 267, 274 n.10 (4th Cir. 1980). The First Circuit has expressed grave concerns about the theory's applicability to subjective decisionmaking processes. See, *e.g., Latino Unidos* v. *Secretary of HUD,* 41 Fair Empl. Prac. Cas. (BNA) 839, 848 (1st Cir. 1986); *Robinson* v. *Polaroid Corp.,* 732 F.2d 1010, 1015 (1st Cir. 1984). By contrast, the Sixth, Eleventh, and District of Columbia Circuits have held that a disparate impact claim is cognizable even though an objective, facially neutral, employment practice has not been identified. See, *e.g., Rowe* v. *Cleveland Pneumatic Co. Numerical Control,* 690 F.2d 88, 93 (6th Cir. 1982); *Griffin* v. *Carlin,* 755 F.2d 1516, 1524-1525 (11th Cir. 1985); *Segar* v. *Smith,* 738 F.2d 1249, 1270-1272, 1288 n.4 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985). The Courts of Appeals for the Fifth,[7] Seventh,[8]

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[7] Compare *Pouncy* v. *Prudential Insurance Co. of America,* 668 F.2d 795, 800-801 (5th Cir. 1982) (disparate impact analysis does not apply to subjective, mixed-component employment decisions), and *Pegues* v. *Mississippi State Employment Serv.,* 699 F.2d 760, 765 (5th Cir.), cert. denied, 464 U.S. 991 (1983) (same), with *Page* v. *United States Industries, Inc.,* 726 F.2d 1038, 1045-1046 (5th Cir. 1984) (assessing lawfulness of a "subjective promotional system" under both disparate treatment and disparate impact analysis).

[8] Compare *Coates* v. *Johnson & Johnson Co.,* 756 F.2d 524, 530-531 n.4 (7th Cir. 1985) (no disparate impact claim where no "facially neutral" rules identified), with *Stewart* v. *General Motors Corp.,* 542 F.2d 445, 450-451 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977) ("highly subjective and loosely structured" promotion practices subject to disparate impact theory), and *Regner* v. *City of Chicago,* 789 F.2d 534, 539 (7th Cir. 1986) (same).

Eight,[9] Ninth, [10] and Tenth[11] Circuits have found the issue so perplexing that panels within those circuits have reached conflicting answers.[12] This Court's intervention is needed to resolve the conflicts and to settle the confusion that presently exists among the courts of appeals.

b. On the merits, we submit that the court of appeals erred in allowing respondent to challenge the Postal Service's subjective, multi-component promotion procedure on a disparate impact theory. The court's holding on this issue is inconsistent with the decisions of this Court.

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[9] Compare *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1132-1133 n.6 (8th Cir.), cert. denied, 454 U.S. 969 (1981) (disparate impact theory not available to challenge subjective decisionmaking process), *Harris* v. *Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) (same), and *Talley* v. *United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984) (same), with *Gilbert* v. *City of Little Rock*, 722 F.2d 1390, 1397-1398 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984) (allowing plaintiff to use disparate impact theory without identifying an objective, neutral employment practice), and *EEOC* v. *Rath Packing Co.*, 787 F.2d 318, 328 (8th Cir. 1986), petition for cert. pending, No. 86-67 (same).

[10] Compare *Atonio* v. *Wards Cove Packing Co.*, 768 F.2d 1120, 1131-1133 (9th Cir. 1985) (petition for rehearing en banc granted) (rejecting disparate impact challenge to subjective hiring procedures), with *Hung Ping Wang* v. *Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982) (applying disparate impact challenge to the absence of an objective promotion standard).

[11] Compare *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982) (plaintiff could not assert disparate impact claim since "she ha[d] not pointed to any employment practice that, neutral on its face, has caused women not to be promoted"), with *Bauer* v. *Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981) (applying disparate impact to subjective hiring and promotion decisions).

[12] To our knowledge, the Third Circuit has not yet addressed the issue.

By enacting Title VII, Congress in 1964 made clear that employers could no longer intentionally select among applicants and employees on the basis of race, sex, or other criteria listed in the statute (42 U.S.C. 2000e-2(a)(1)). Less clear, however, was whether employers could, in good faith and without intent to discriminate, continue to use standardized tests and other mechanical selection devices. See S. Rep. 91-1137, 91st Cong., 2d Sess. 4 (1970). For a number of reasons, employers often prefer to use objective rather than subjective selection procedures: Standardized selection devices are less expensive to administer; they produce consistent and comparable results; and, by depriving personnel officers of discretionary authority, they help ensure that Title VII's commands are obeyed by those with the greatest opportunity to abuse them. See Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria Of Hiring And Promotion,* 82 Harv. L. Rev. 1598, 1637-1638 (1969). Because, however, it is difficult and expensive to fine-tune such objective devices so that they measure only qualities necessary to specific jobs, employers sometimes use tests and other specific qualifications that overstate what is necessary for competent performance and that, because of the lingering effects of society's past discrimination, may disproportionately exclude members of minority groups from various employment opportunities. See *id.* at 1638-1649; see generally Blumrosen, *Strangers In Paradise:* Griggs v. Duke Power Co. *And The Concept of Employment Discrimination,* 71 Mich. L. Rev. 59, 66-75 (1972).

It is against this background that the Court, in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), first approved the use of disparate impact theory to establish unlawful employment discrimination. In *Griggs*, the Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if

they operate to 'freeze' the status quo of prior discriminatory employment practices" (401 U.S. at 430). The Court determined that Congress had "required * * * the removal of artificial, arbitrary, and unnecessary barriers to employment" (*id.* at 431) and, in the Court's view, "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" constitute such artificial barriers (*id.* at 432). Thus, while the Court concluded that "[n]othing in the Act precludes the use of testing or measuring procedures" (*id.* at 436), it also determined that "Congress has forbidden * * * giving these devices and mechanisms *controlling* force unless they are demonstrably a reasonable measure of job performance" (*ibid.*) (emphasis added). Rather, the Court held, "Congress has commanded * * * that any tests used must measure the person for the job and not the person in the abstract" (*ibid.*).

Thus, in approving use of the disparate impact theory, the *Griggs* Court was responding to the special exclusionary problems associated with the use of objective selection devices—"practices, procedures or tests neutral on their face." This focus on the problems caused by objective selective devices reappears in the Court's subsequent disparate impact cases, each of which has involved an objective, facially neutral employment practice. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (exclusion from disability plan due to pregnancy); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) (rule denying accumulated seniority to employees returning to work after pregnancy); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (anti-narcotics rule); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written examination).

In contrast, where subjective selection devices have been in issue, and thus where the unique exclusionary problems associated with objective selection devices are not present, the Court has instead required plaintiffs to prove discriminatory motivation. See, *e.g.*, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978) (subjective hiring practice); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977) (same); *Teamsters* v. *United States*, 431 U.S. 324 (1977) (same); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) (subjective refusal to rehire). Indeed, the Court has twice indicated that the reasoning of *Griggs* does not apply in cases where plaintiffs are challenging subjective decisionmaking processes.

Most specifically, in *Furnco Construction Corp.* v. *Waters*, the Court expressly contrasted the selection device in issue—an employer's subjective hiring practices—with "employment tests * * * or particularized requirements such as the height and weight specifications * * * " (438 U.S. at 575 n. 7). The Court determined that these subjective hiring practices should be assessed under the disparate treatment, and not under the disparate impact, framework (*id.* at 575 & n.7).[13]

More generally, in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 805-807, the Court contrasted a subjective decision to dismiss an employee for misconduct with the type of objective decisionmaking processes at issue in *Griggs*. The Court noted that *Griggs* (411 U.S. at 806 (citation omitted)):

> * * * dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effec-

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[13] Justice Marshall dissented "from the Court's apparent decision * * * to foreclose on remand further litigation on the *Griggs* question of whether [the employer's] hiring practices had a disparate impact" (438 U.S. at 583) (Marshall, J., concurring in part and dissenting in part).

> tively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in * * * education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. * * * [His employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification * * *. [His employer] assertedly rejected [him] for unlawful conduct * * * and * * * this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

Thus, the Court in *McDonnell Douglas* vacated a lower court decision that had apparently applied the *Griggs* requirement of "job-relatedness" to the reasons given to justify a subjective dismissal decision (411 U.S. at 805-806).

The holdings in *Furnco* and *McDonnell Douglas* "derive from the basic distinction * * * between disparate impact and disparate treatment litigation" (3 A. Larson & L. Larson, *Employment Discrimination* § 76.34, at 15-87 (1984)). Disparate impact litigation challenges "facially neutral" selection procedures—*i.e.*, employment practices that are mechanical in nature and that limit, segregate, or classify independently of operator bias. See *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. Disparate treatment litigation challenges "judgmental" selection—*i.e.*, the use or application of non-mechanical, operator-dependent procedures or criterion. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802-806; *Teamsters* v. *United States*, 431 U.S. at 335-336 n. 15; *Burrus* v. *United Tel. Co.*, 683 F.2d 339 (10th Cir.), cert. denied, 459 U.S. 1071 (1982); *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d

864 (9th Cir. 1982). When an employer's decisionmaking process is in part discretionary, "there is simply no 'neutral' factor involved. * * * [W]hat is going on is an ad hoc decision process in which a subjective judgment is being made about an individual" (3 A. Larson & L. Larson, *supra*, at 15-87 to 15-88; see also *id.* at 15-91 to 15-98). Accordingly, such subjective decisionmaking processes are rightly assessed only for their operator's motivation—the sine qua non of a disparate treatment case.[14]

In suggesting that disparate impact theory is applicable only to objective (and not to subjective) decisionmaking processes, we do not imply that the line between subjective and objective decisionmaking processes—and thus the line between cases subject to disparate impact and disparate treatment analysis—is always obvious. We suggest, however, that the distinction turns on whether the decisionmaking process involves "quantifiable or objectively verifiable selection criteria which are mechanically applied * * * " (*Zahorik* v. *Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984); see also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 806 & n.21), and we believe that courts can reasonably make this determination. Here, of course, the district court did precisely that and found the process in issue to be partially subjective. See App., *infra*, 35a-36a.[15]

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[14] Of course, a plaintiff can still use statistical evidence to prove discriminatory motivation. See *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 306-313 (1977); *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15, 339-340 n.20.

[15] Because we suggest that only quantifiable or objectively verifiable decisionmaking processes are subject to disparate impact theory, we agree with Professor Larson that selection processes which include both objective and subjective components must be considered non-quantifiable or verifiable, and thus subjective. See 3 A. Larson & L. Larson, *supra*, at 15-91 to 15-98. In this case, the district court held, that the Postal Service's promotion procedure is precisely such a

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Allowing plaintiffs to proceed on a disparate impact theory against such decisionmaking processes, which are neither quantifiable or objectively verifiable, would have consequences incompatible with the policies underlying Title VII itself. Those consequences result from the different defenses legally available to employers in disparate treatment and disparate impact cases. In a disparate treatment case, after a plaintiff establishes an inference of discriminatory intent (by use of the *McDonnell Douglas* factors or by other circumstantial or statistical evidence), the employer must offer evidence of a legitimate, nondiscriminatory reason for the actions it has taken. See *Teamsters* v. *United States*, 431 U.S. at 342; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802. Having weighed alternatives and exercised judgment, the employer is required to articulate the reasons it had for the actions it took, and in that way is given the chance to refute the inference that an improper discriminatory motive was at work.

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mixed component system. See App., *infra*, 35a-36a. Accordingly, we believe that the courts below erred in allowing respondent to proceed on a disparate impact theory.

Of course, even where a mixed-component selection process is involved, a plaintiff can challenge an objective component of that process for its own disparate impact. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982). However, since respondent has not made any such allegation in this case, the decisions below cannot be defended on that basis.

Finally, we note that this petition does not address the permissibility of a plaintiff pursuing a disparate impact claim directed at the bottom line results of a multi-step, but completely objective, decisionmaking process. Compare *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d at 800-801 (suggesting that disparate impact theory never applies to any multi-component systems, even if completely objective), with *Griffin* v. *Carlin*, 755 F.2d at 1525 (suggesting that disparate impact theory always applies to all multi-component systems). That issue is not raised by the facts of this case, which involve the Postal Service's mixed-component promotion procedure.

By contrast, in a disparate impact case, after a plaintiff establishes a statistically significant disparity in the treatment of majority and minority workers, the employer must "validate" the device that cause the disparity—*i.e.*, show by rigorous empirical proof that the selection device accurately assesses necessary job criteria. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425-436. While this is an extremely expensive and time-consuming process,[16] written examinations, height and weight requirements, and other objective personnel selection devices arguably can be validated in this fashion. The same cannot be said of subjective selection processes: They are not susceptible to such rigorous validation and, practically speaking, may not be susceptible to validation at all. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802, 806 n.21; 3 A. Larson & L. Larson, *supra*, at 15-85 to 15-86; see also 29 C.F.R. 1607.6B(1). Thus, employers are inherently less able to show that a subjective decisionmaking process is justified by business necessity and, if plaintiffs are allowed to challenge subjective decisionmaking processes on a disparate impact theory, will have "little choice * * * but to engage in * * * subjective quota system[s] of employment selection." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); see also *Atonio* v. *Wards Cove Packing Co.*, 768 F.2d 1120, 1133 (9th Cir. 1985) ("Were the facial-neutrality threshold to disappear or be ignored, * * * [r]ather than being an irrelevant factor as envisoned, race (or sex, etc.) could then become an overriding factor in employment decisions.").

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[16] Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6; Gwartney, Asher, Haworth & Haworth, *Statistics, the Law, and Title VII: An Economist's View*, 54 Notre Dame Law. 633, 643 (1979).

"This, of course, [would be] far from the intent of Title VII" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449) (Blackmun, J., concurring in the judgment). Title VII does "not require employers or labor unions to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination" (*Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 27). To the contrary, it prohibits them from doing so. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Firefighters* v. *Stotts*, 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring).

To be sure, in some circumstances, employers might avoid this dilemma by replacing their subjective decision-making processes with completely objective ones. But, for many employment decisions, especially decisions involving professional positions or managerial positions of the type that respondent sought here, objective criteria do not exist and cannot reasonably be derived. See Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 Nw. U. L. Rev. 776, 787-788 (1983). Moreover, the "statute was not intended to 'diminish traditional management prerogatives' " (*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (quoting *Steelworkers* v. *Weber*, 443 U.S. 193, 207 (1979)), or to "impose a duty to adopt * * * procedure[s] that maximize[] [selection] of minority employees" (*Furnco Construction Corp.* v. *Waters*, 438 U.S. at 577-578) . The legislative history of Title VII demonstrates that Congress intended that " 'management prerogatives, and union freedoms * * * be left undisturbed to the greatest extent possible.' " *Steelworkers* v. *Weber*, 443 U.S. at 206 (quoting H.R. Rep. 914, 88th Cong., 1st Sess. Pt. 2, at 29 (1963)). Congress simply did not intend to discourage employers from experimenting and using innovative personnel selection methods, or to require employers to use only objective selection devices. See *Contreras* v. *City of*

Los Angeles, 656 F. 2d 1267, 1278 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); 110 Cong. Rec. 11848 (1964) (remarks of Senator Humphrey) (Title VII does not "permit the Government to control the internal affairs of employers * * * "). Congress required only that employers' subjective decisions not be intentionally discriminatory. See *Furnco Construction Corp.* v. *Waters,* 438 U.S. at 575, 577-578.

Significantly, in addition to her disparate impact claim, respondent raised a disparate treatment claim on which both the district court and the court of appeals found for the Postal Service. The district court expressly found that "the procedure used by the Postal Service to initially select candidates for promotion consideration was permissible and without overt indicia of discrimination" (App. *infra,* 42a). The court also found that the Postal Service had a "legitimate, nondiscriminatory reason" for not promoting respondent (*id.* at 41a). The court of appeals affirmed these findings. See App., *infra,* 14a. We submit that any additional inquiry into such promotion procedures will undermine the delicate accommodation of policies that Title VII makes.[17] The contrary resolution of this issue by the court of appeals warrants review by this Court.

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[17] Though the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. Pt. 1607, contain directives which point in different directions, those Guidelines are not inconsistent with the position taken here. The Guidelines provide that the "use of any selection procedure which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered discriminatory * * * *unless* * * * the procedure has been validated * * * *or* the provisions of section 6 [of the Guideline] * * * are satisfied" (29 C.F.R. 1607.3A) (emphasis added). A "selection procedure" is defined to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q).

2. Assuming, arguendo, that the Postal Service's subjective promotion procedure can be challenged under the disparate impact theory, we further ask that the Court determine whether respondent's statistics were sufficient to establish that that procedure has a prima facie discriminatory impact. The district court held those statistics to be patently inadequate. It held that, where "management jobs which demand skills and training possessed by relatively few individuals" are in issue, statistics reflecting the selection rate rather than data relating only to some imbalance in the workforce are required to establish such a prima facie case (App., *infra*, 37a). The court of appeals reversed, holding that, "[o]nce [respondent] proved that the Postal Service promotes from within and introduced statistical evidence showing that there is a gross disparity between the percentage of women occupying lower level positions and upper level

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Section 6 of the Guidelines goes on to state, however, that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines" (29 C.F.R. 1607.6B (emphasis added)), that such "circumstances" include the use of "informal or unscored selection procedure[s]" (Section 1607.6 B(1)), and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (*ibid.*). See generally 43 Fed. Reg. 38290, 38291 & n.17 (1978); 44 Fed. Reg. 11196, 12001-12002 (1979).

While the Guidelines do not expressly so state, we believe that an employer justifies "continued use of the procedure in accord with Federal law" by setting forth legitimate, nondiscriminatory reasons for maintaining the selection procedure and for applying it in particular cases, as is required in disparate treatment cases. See *Teamsters* v. *United States*, 431 U.S. at 342; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802. Otherwise, the Guidelines would leave the employer with no possible defense to a showing that its subjective decision-making process has an adverse impact and, as the inclusion of Section 6 indicates, the Guidelines clearly do not contemplate placing the employer in such a dilemma.

positions, she made a sufficient prima facie showing of discriminatory impact" (*id.* at 5a). This holding of the court of appeals is worthy of this Court's review.

a. The court of appeals' holding is substantially inconsistent with the decisions of at least four other circuit courts dealing with the use of statistical proof in employment discrimination cases.[18] In situations involving promotion or selection for higher level positions requiring special skills or abilities, the courts of appeals for the Second, Fourth, Fifth, and District of Columbia Circuits have all held that a plaintiff cannot establish a prima facie case merely by showing that the employer promotes from within and that there is an imbalance between minority representation in the higher and lower levels of the employer's workforce. See *Ste. Marie* v. *Eastern R.R. Ass'n,* 650 F.2d 395, 400-401 (2d Cir. 1981); *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178, 184-186 (4th Cir. 1979); *EEOC* v. *Chesapeake & O. Ry.*, 577 F.2d 229, 233 (4th Cir. 1978); *Rivera* v. *City of Wichita Falls,* 665 F.2d 531, 546 (5th Cir. 1982); *Metrocare* v. *Washington Metropolitan Area Transit Auth.*, 679 F.2d 922, 930 (D.C. Cir. 1982). Rather, in such cases, the courts have held that, to support an inference that minority employees have been selected at a substantially disproportionate rate, a

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[18] The cases we cite include disparate treatment as well as disparate impact cases. In citing disparate treatment cases, we are not unmindful that the plaintiff in a disparate treatment case carries the added burden of proving discriminatory intent. *See Teamsters* v. *United States,* 431 U.S. at 335-336 n.15. However, where statistics are involved, both disparate treatment and disparate impact challenges to promotion procedures must, as a threshold requirement, present data sufficient to give rise to an inference of a substantially disproportionate rate of selection. See B. Schlei & P. Grossman, *supra*, at 1286-1289, 1331-1346. Accordingly, disparate treatment cases pointing out the insufficiencies of plaintiffs' prima facie statistical proofs are highly probative of the issue at hand.

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Title VII plaintiff must offer evidence from which conclusions can reasonably be drawn about the results produced by the selection process. That is, the plaintiff must present evidence about the actual selections during the relevant time period and, in appropriate circumstances, evidence about the qualifications of those in the work force, the expressed interests of those minority persons in advancing to the positions in question, and/or, the actual group of candidates considered for promotion. Because respondent's statistical data says nothing about actual selections made, and does not account for any of these other critical variables, it cannot support any inference of a disproportionate selection rate (as the district court held). We therefore ask this Court to intervene and clarify the thresholds that a Title VII plaintiff's statistics must satisfy in order to establish a prima facie case of adverse selection.

b. On the merits, we submit that the court of appeals erred in finding that respondent's quite limited statistical evidence, relating to the proportion of women in various parts of the Postal Service's work force, was sufficient to establish a prima facie case.

Respondent demonstrated, and the district court found, that women occupied approximately one-fifth of both the overall Postal Service work force [19] and the postmaster positions in the North Suburban MSC in 1978, the year of the challenged decisions. See App., *infra,* 5a n.1. Respondent also showed that none of the female postmasters were rated higher than pay scale level-20 and that 15 of the 23 female postmasters were at pay scale level-15 or below (*ibid.*). Finally, respondent demonstrated that, while the Postal Service has positions of unspecified description in

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[19] The statistics showed that between 1974 and 1980 the representation of women in the Postal Service work force changed from 20.8% to 23.5%.

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the North Suburban MSC ranging as high as pay scale level-27, only five percent of the women in that work force were rated in pay scale levels-19 or higher (*ibid.*). These statistics are not probative of adverse selection.

"Statistics * * * come in infinite variety and, like any other evidence, * * * their usefulness depends on all of the surrounding facts and circumstances" (*Teamsters* v. *United States*, 431 U.S. at 340). When properly constructed, statistics can aid in determining whether employment actions have resulted from discrimination or from legitimate, nondiscriminatory employment requirements (*id.* at 339-340). But, like other circumstantial evidence, statistics must meet certain thresholds of sufficiency if they are to be probative of discrimination. See *ibid.; Bazemore* v. *Friday,* No. 85-93 (July 1, 1986), slip op. 12-13 & n.10; see generally B. Schlei & P. Grossman, *supra*, at 1331-1346. Specifically, as noted in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), the plaintiff's proof must create an inference that the "standards in question *select* applicants * * * in a *significantly discriminatory pattern*" (*id.* at 329) (emphasis added); see also 29 C.F.R. 1607.4 (EEOC Guidelines emphasizing that proof of disparate impact must focus on selection rates).

In *New York City Transit Authority* v. *Beazer,* 440 U.S. 568 (1979), the Court discussed deficiencies in statistical proof that prevent the drawing of any inference about the rate of selection. In *Beazer,* the plaintiffs challenged a public employer's policy against hiring persons on methadone maintenance. They claimed that the policy had a discriminatory disparate impact on blacks and Hispanics and, in that regard, introduced statistics showing that 63 to 65% of the persons in New York receiving methadone maintenance in public programs were black and Hispanic. But the Court found the plaintiffs' evidence too unrefined to be helpful (440 U.S. at 585):

> We do not know * * * how many of these persons ever worked for or sought to work for [this employer]. Th[ese] statistic[s] revea[l] little if anything

> about the racial composition of the class of [this employer's] employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees * * * improperly excluded [from] the * * * analysis.

440 U.S. at 585-586. Thus, while the Court did not have to decide whether the plaintiffs' statistics actually established a prima facie case of disparate impact (because the employer showed that the challenged policy was job-related) (*id.* at 587), the Court emphasized that the plaintiffs' demonstration of the challenged policy's effect on applicants was "[a]t best * * * weak" (*ibid.*), and concluded that, "when the entire record is examined[,] it is clear that the two statistics on which [the plaintiffs] and the district court relied [did] not prove a violation of Title VII" (*id.* at 584).

Like *Griggs, Albemarle,* and *Dothard* before it, *Beazer* teaches that, to establish a prima facie case of disparate impact, the plaintiff must create an inference that the selection procedure "select[s] applicants for hire or promotion in a racial [or gender] pattern significantly different from that of the pool of applicants" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425) or, in appropriate circumstances, in a pattern different from that of the general work force as a whole. See *New York City Transit Authority* v. *Beazer,* 440 U.S. at 584-587; see also *Albemarle Paper Co.* v. *Moody,* 422 U.S. at 425; *Griggs* v. *Duke Power Co.*, 401 U.S. at 429-430; *Dothard* v. *Rawlinson*, 433 U.S. at 329. Statistics merely showing a disparity between levels of a work force will not do so. They show nothing about how many people were promoted or who among those promoted were male or female (or black or white). See *New York City Transit Authority* v. *Beazer,* 440 U.S. at 585-586; *Rivera* v. *City of Wichita Falls,* 665 F.2d at 546-547. Nor do such statistics address in any way whether members of the minority group were interested in, or considered for, the jobs in question. See *New York City*

Transit Authority v. *Beazer,* 440 U.S. at 585-586. And they do not indicate what skills or training members of the identified labor pools have or can easily acquire. See *Metrocare* v. *Washington Metropolitan Area Transit Auth.,* 679 F.2d at 930; cf. *Mayor* v. *Educational Equality League,* 415 U.S. 605, 619-621 (1974). Accordingly, both this Court and the courts of appeals have held that, where statistics do not expressly reflect or reasonably approximate the rates at which employees are selected, they do not establish an inference that the procedure has adversely selected minority employees. See, *e.g., New York City Transit Authority* v. *Beazer,* 440 U.S. at 585-587; *Hazelwood School Dist.* v. *United States,* 433 U.S. at 308 n.13; *Mayor* v. *Educational Equality League,* 415 U.S. at 620-621; *Rivera* v. *City of Wichita Falls,* 665 F.2d at 546-547; *Metrocare* v. *Washington Metropolitan Area Transit Auth.,* 679 F.2d at 930.[20]

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[20] In *Dothard,* this Court accepted plaintiffs' "generalized national statistics" as a proxy for the potential applicant pool available to the employer. See *Dothard* v. *Rawlinson,* 433 U.S. at 330. But, in using these general availability figures, the Court still recognized that the ultimate question was whether the selection process in issue had a disproportionate exclusionary effect on women as compared to men. See *id.* at 329-330 & n.12. The Court did not simply inquire whether there were fewer women in the work force than in the general population.

Moreover, the *Dothard* Court was only willing to use such generalized statistics because "there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population" (433 U.S. at 330), and because "[t]he application process itself might not [have] adequately reflect[ed] the actual potential applicant pool, since otherwise qualified people might [have] be[en] discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory" (*ibid.*). The *Dothard* Court's use of such generalized data, therefore, does not excuse respondent, in a case involving promotions to management or higher level positions, from her ordinary burden of accounting for qualifications of potential

Here, of course, respondent made no effort to account for *any* of the variables that this Court has indicated can be used to establish an inference of disparate selection rate. She presented no evidence about the relative numbers of men and women who have actually been promoted. She made no effort to account for the flow of applicants into and within the Postal Service's work force. She did not show the time period over which the disparity in minority representation had developed, or how women are distributed in the various pay scale levels. And, though the Postal Service "demonstrated that the persons selected to fill the vacancies were required to have high levels of management skills" (App., *infra*, 41a; see also *id.* at 35a-37a), and that numerous applicants were deemed lacking even the minimum qualifications necessary for promotion (*id.* at 20a), respondent presented no evidence about the qualifications of women in the lower levels of the work force. She showed only that the Postal Service has a policy of promoting from within and that an arguably gross disparity exists between the percentage of females occupying the low-level and high-level positions in the Postal Service's work force. Such proof sheds no light on the operation or exclusionary effects of the challenged promotion procedure and, accordingly, is insufficient to establish any inference of an adverse selection rate.

Moreover, the Postal Service, by cross-examination and rebuttal, argued that respondent's statistics had no probative value whatsoever. It showed that, in each of the three promotions that respondent challenged, only one of approximately 30 applicants was female (and, thus, that

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applicants, actual applicant flow data, or at least actual selection rates. See *New York City Transit Authority* v. *Beazer*, 440 U.S. at 584-587; *Dothard* v. *Rawlinson*, 433 U.S. at 348-349 (opinion of White, J.) (arguing that plaintiff did not establish that all members of labor pool used were interested in job in issue); *Rivera* v. *City of Wichita Falls*, 655 F.2d at 546-547; *Metrocare* v. *Washington Metropolitan Area Transit Auth.*, 679 F.2d at 930.

females may not regularly seek promotion); that the Postal Service has in the past hired postmasters from outside of its own work force; that women have only recently begun to enter the Postal Service's work force in large numbers (and that this recent entrance may account for the high percentage of females in the lower levels); that pay scale level-22 jobs require unique management skills; and that the Postal Service denied respondent a promotion because other, more highly-skilled, employees were available. On the basis of this full evidentiary record, the district court held that respondent's statistics did not establish that the Postal Service had selected employees at a discriminatory rate. This finding is supported by the evidence and should have disposed of the case.

In remanding the case with instructions that the Postal Service can rebut respondent's statistics only with "evidence of a low percentage of female applicants for upper level jobs or evidence of the lack of qualifications of women in lower level positions" (App., *infra,* 7a-8a.), the court of appeals has apparently dismissed out of hand the Postal Service's cross-examination and rebuttal testimony and held instead that gross statistical imbalances can be refuted only with applicant flow or qualifications data. This approach requires the Postal Service to bear the burden and expense of actually proving that its procedure does not have a disparate impact, rather than simply producing evidence to dispel any inference created by respondent's meager proof. In doing so, the court of appeals has reversed traditional burdens of proof in a way that will unnecessarily delay the resolution of legitimate Title VII suits, complicate and impede the prompt evaluation and disposition of frivolous Title VII claims, and further none of the policies that Title VII seeks to promote.[21] This Court's review is warranted.

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[21] That the district court found respondent to be less qualified than those actually promoted underscores the incorrectness of the court of

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
WM. BRADFORD REYNOLDS
Assistant Attorneys General

DONALD B. AYER
Deputy Solicitor General

JAMES M. SPEARS
MICHAEL CARVIN
Deputy Assistant Attorneys General

GLEN D. NAGER
Assistant to the Solicitor General

DAVID K. FLYNN
E. ROY HAWKENS
Attorneys

SEPTEMBER 1986

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appeals' remand. It is axiomatic that Title VII limits "make-whole" relief to those employees who would have received the contested benefit "but for" their sex (or race). See *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 US. 702, 711 (1978); see also *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1080 (1983). Thus, the district court has no authority to order any relief for respondent, since she was refused "* * * advancement * * * for [a] reason other than discrimination on account of * * * sex * * *." 42 U.S.C. 2000e-5(g). The court of appeals' remand serves no readily apparent purpose.

APPENDIX A

In the United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 84-2791

DARLENE SHIDAKER, PLAINTIFF-APPELLANT

v.

PAUL N. CARLIN, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE) DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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[Jan. 29, 1986]

Before CUMMINGS, *Chief Judge*, and BAUER and FLAUM, *Circuit Judges*.

BAUER, *Circuit Judge*. This is an appeal by Darlene Shidaker from an adverse judgment entered below in favor of Paul N. Carlin in his capacity as Postmaster General of the United States Postal Service. Shidaker, a postal employee, claims that the Postal Service denied her a promotion because she is a woman and then demoted her for challenging that promotion denial as discriminatory. We reverse and remand for further consideration the district court's finding that Shidaker's promotion denial was not discriminatory. We affirm, however, the district court's finding that Shidaker's demotion was not retaliatory.

I.

Shidaker was Acting Postmaster and then Postmaster of Kenilworth, Illinois from 1962 through 1982. In this position she was in pay scale category PES-18.

In 1977 Shidaker applied for vacant postmaster positions at Glenview, Palatine, and Franklin Park, Illinois. These positions were PES-22 positions. Ninety-two postal employees (the Postal Service follows a policy of promoting from within) applied for the vacant postmaster positions. Shidaker was the only female applicant. Shidaker was not promoted to any of the positions. The lower court found that two of the men who were promoted were better qualified than Shidaker and that the other promotee was as qualified as Shidaker.

In 1978 Shidaker filed an Equal Employment Opportunity ("EEO") complaint alleging that she was denied promotion to the PES-22 postmaster positions on the basis of sex. In 1980 an Equal Employment Opportunity Commission Complaint Examiner held a hearing on Shidaker's complaint. In September 1982 the Complaint Examiner issued a decision on the complaint finding that Shidaker was denied promotion on the basis of sex. In October 1982 the Postal Service's Regional Director for Employment and Labor Relations Central Region notified Shidaker that the Postal Service was rejecting the Examiner's decision.

On February 8, 1982 Shidaker received a "Proposed Notice of Reduction in Grade" from her immediate supervisor, Frank J. Santoro. Santoro's notice proposed that Shidaker be reduced from Postmaster, Kenilworth, PES-18, to distribution clerk, PES-5, because of alleged official misconduct. The notice informed Shidaker that she had the right under Postal Service regulations to answer the charges in the notice. The notice told her to direct her response to Santoro's superior, Richard Koenigs, District Manager of the Northern Illinois District, the official who would initially decide whether the demotion would occur.

Shidaker responded to Santoro's notice in two ways: she sent a letter to Koenigs answering the charges, and she filed a second EEO complaint. This complaint alleged that the proposed reduction in grade was in retaliation for her filing the first complaint challenging the promotion denial.

After Shidaker had answered Santoro's charges in her letter to Koenigs, Santoro wrote Koenigs a personal letter. In his letter Santoro responded to Shidaker's answers, alleged an additional ground for demoting Shidaker, and urged Koenigs to approve Shidaker's reduction in grade "for the good of the Service." Shidaker was unaware of this letter until after Koenigs approved her demotion.

Shidaker was eventually demoted to distribution clerk, PES-5. Shidaker filed an administrative appeal with the Postal Service from this reduction in grade and was accorded a full *de novo* hearing before a hearing officer appointed to examine the merits of her appeal. Shidaker was given a chance to respond to all charges and evidence including Santoro's letter to Koenigs. After the hearing, the Postal Service informed Shidaker by letter that the charges against her were supported by the evidence and that the demotion was warranted.

Shidaker sued the Postal Service in the United States District Court for the Northern District of Illinois, Eastern Division. Her complaint is in two counts. Count I alleges discriminatory failure to promote under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 and 39 U.S.C. § 409. Count II seeks review of Shidaker's administrative appeal of her demotion.

The district court made findings adverse to Shidaker on both counts and entered judgment accordingly. As regards Count I, the district court found that Shidaker failed to establish a *prima facie* case of discriminatory impact. The court found that Shidaker did make a *prima facie* showing of disparate treatment, but also found that the Postal Service demonstrated legitimate nondiscriminatory reasons for not promoting Shidaker that were not pretex-

tual. Shidaker's discrimination count was thus found to be without merit. As regards Count II, the district court found that there was substantial evidence to support the Postal Service's finding that Shidaker was demoted for misconduct and poor performance and not in retaliation for challenging her promotion denial. The court also found that the Postal Service's administrative review of Shidaker's appeal was in adequate compliance with its own procedural regulations. This appeal followed.

II.

Shidaker makes two main arguments on appeal, one charging error in the trial court's treatment of her discrimination claim and the other charging error in its treatment of her retaliation claim. First, Shidaker argues that the district court erroneously found that she failed to make a *prima facie* showing of discriminatory impact. She argues that when an employer follows the policy of promoting from within (that is, fills high level positions with lower level employees rather than bringing in "laterals"), a plaintiff need only show statistical evidence of an imbalance between the percentage of a minority occupying high level positions and the percentage of that minority occupying lower level positions in order to make a *prima facie* case of discriminatory impact. Second, Shidaker claims that Santoro's letter to Koenigs was an *ex parte* communication that violated the Postal Service's regulatory procedures and denied Shidaker due process of law.

We agree with Shidaker that she made an adequate *prima facie* showing of discriminatory impact. We therefore reverse the district court's findings and judgment to the contrary, and remand Shidaker's discriminatory impact claim for further consideration. We affirm the district court's judgment in all other respects, however, including its finding that despite Santoro's letter to Koenigs the Postal Service adequately complied with its own procedural regulations when demoting Shidaker.

A.

The district court incorrectly found that Shidaker failed to make a *prima facie* showing of discriminatory impact. Once Shidaker proved that the Postal Service promotes from within and introduced statistical evidence showing that there is a gross disparity between the percentage of women occupying lower level positions and upper level positions,[1] she made a sufficient *prima facie* showing of discriminatory impact. She need not, as the district court apparently thought, *Shidaker* v. *Bolger,* No. 82 C 5635, mem. op. at pp. 26-27 (N.D. Ill. E.D. 1984), make a further showing of the percentage of female applicants for upper level positions or the percentage of lower level female employees qualified for upper level positions.

To make a *prima facie* showing of discriminatory impact Shidaker need only present evidence that the Postal Service's promotion practices, although facially neutral,

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[1] The district court summarized Shidaker's statistical evidence as follows:

> The statistics presented to the Court are as follows: In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5% by November, 1980. Nationally, women held 11.5% of the positions at PES 15 and above in January, 1980.
>
> In 1978, the year of Shidaker's failed promotion, women occupied 23 of the 108 postmaster positions in the North Suburban MSC, or 21.1% of the total postmaster positions. However, none of the women postmasters were rated higher than PES 20 and 15 of them were at level PES 15 or lower. Additionally in 1977-78 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% were rated in positions of PES 19 or higher. Grossly, the disparities could be significant.

Shidaker v. *Bolger,* No. 82 C 5635, mem. op. at 26 (N.D. Ill. E.D. 1984).

select promotees "in a significantly discriminatory pattern". *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). This evidence may be, and most often is, statistical in nature. *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 584 (1979); *Teamsters* v. *United States,* 431 U.S. 324, 339-40 (1977). Only in very limited instances may a court find discriminatory impact from non-statistical evidence. *Dothard* v. *Rawlinson,* 433 U.S. 321, 330 (1977); *Carpenter* v. *Board of Regents,* 728 F.2d 911, 914 (7th Cir. 1984).

Gross disparity between the racial or gender composition of the relevant labor pool and the composition of the group occupying the positions in question can, by itself, make a *prima facie* case of disparate impact. *Mozee* v. *Jeffboat,* 746 F.2d 365, 372 (7th Cir. 1984); *Clark* v. *Chrysler,* 673 F.2d 921, 927 (7th Cir. 1982), *cert. denied,* 459 U.S. 873 (1982); *Movement for Opportunity and Equality* v. *General Motors,* 622 F.2d 1235, 1244-45 (7th Cir. 1980); *See also, Hazelwood School District* v. *United States,* 433 U.S. 299 (1977). Where a company is shown to promote from within, the relevant labor pool for upper level positions is the group of employees from which promotees will be drawn. *Hazelwood,* 433 U.S. at 308 n. 13; *Mozee* v. *Jeffboat,* 746 F.2d 365, 372 (7th Cir. 1984); *Movement for Opportunity and Equality* v. *General Motors,* 622 F.2d 1235, 1258 (7th Cir. 1980); *Paxton* v. *Union National Bank,* 688 F.2d 552, 563-64 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983); *Fisher* v. *Procter & Gamble Mfg.,* 613 F.2d 527, 544 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981). Thus, where the plaintiff can show that the employer promotes from within, evidence of a gross disparity between the percentage of a minority in upper and lower level positions is sufficient to

make a *prima facie* case of disparate impact. *Mozee* v. *Jeffboat,* 746 F.2d 365, 372 (7th Cir. 1984); *Segar* v. *Smith,* 738 F.2d 1249, 1276-77 (D.C. Cir. 1984), *cert. denied sub nom. Meese* v. *Segar,* ____U.S. ____, 105 S.Ct. 2357 (1985); *Fisher* v. *Procter & Gamble Mfg.,* 613 F.2d 527, 544 (5th Cir. 1980).

Once a plaintiff makes a *prima facie* showing with statistics of this nature, the burden shifts to the defendant to rebut the inference of discrimination raised by these statistics. *Washington* v. *Davis,* 426 U.S. 229, 241 (1976). Defendants may rebut a statistical *prima facie* showing of disparate impact with statistical evidence of their own that is "more refined, accurate and valid", *Movement for Opportunity and Equality* v. *General Motors,* 622 F.2d 1235, 1245 (7th Cir. 1980); *Teamsters* v. *United States,* 431 U.S. 324, 339-40 and 360 (1977), or by showing that the challenged standards causing the discriminatory pattern are job related. *Washington* v. *Davis,* 426 U.S. 229, 246-47 (1976); *Griggs* v. *Duke Power,* 401 U.S. 424, 431 (1971).

Thus, it is not up to Shidaker to proffer evidence of lower level female employees' qualifications or evidence of the percentage of lower level female employees who applied for upper level positions. The burden is now on the Postal Service to bring forward evidence that few women occupying lower level positions have applied for upper level positions or are qualified for upper level positions, or to bring forward evidence of the job-relatedness of its promotion standards.

We must, therefore, remand Shidaker's discriminatory impact claim for further consideration by the district court. If the Postal Service can come forward with evidence of a low percentage of female applicants for upper level jobs or evidence of the lack of qualifications of

women in lower level positions, the Service might possibly rebut the inference of discrimination that arises from Shidaker's *prima facie* statistical showing. The Service might also be able to show the job-relatedness of its promotion standards. These determinations are best left in the discretion of the district court on remand, *Soria* v. *Ozinga Bros.*, 704 F.2d 990, 995 n.6 (7th Cir. 1983), and are not properly before us for review.

B.

The district court correctly found that the demotion procedure was in adequate compliance with Postal Service regulations. We reject Shidaker's claim that Santoro's letter to Koenigs was an *ex parte* communication that "voided" the demotion decision.

Shidaker alleges that the demotion procedure violated Postal Service regulations and thereby denied her due process. Specifically, Shidaker claims that Santoro's personal letter to Koenigs, sent after Shidaker responded to Santoro's notice of reduction in grade, was in violation of § 661.5 of the Postal Service's Disciplinary, Grievance and Appeal Procedures. That section provides that employees are to have notice and a chance to respond to charges against them when they are the subject of a proposed adverse action. Shidaker claims that this section was violated by Santoro's letter because Santoro's letter alleged an additional ground for demoting Shidaker and Shidaker was unaware of that letter until after Koenigs made the decision to demote her. The Postal Service apparently concedes that § 661.5 was violated here, and we, therefore, assume that it was.

It is well-settled that an agency must abide by its own regulations when discharging or disciplining an employee. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 389 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). Every minor deviation from pro-

cedural guidelines, however, does not amount to a denial of procedural due process sufficient to vitiate the entire administrative proceeding. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 558 (1978); *County of Del Norte v. United States,* 732 F.2d 1462, 1467 (9th Cir. 1984), *cert. denied sub nom. Assoc. of Cal. Water Agencies v. United States,* ____ U.S. ____, 105 S.Ct. 958 (1985); *Boylan v. United States Postal Service,* 704 F.2d 573, 577 (11th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1916 (1984); *Doe v. Hampton,* 566 F.2d 265, 277 (D.C. Cir. 1977). The question becomes one of determining the seriousness of the error by looking to possible prejudice resulting from such error. *Vermont Yankee Nuclear Power,* 435 U.S. at 558; *United States v. Lovasco,* 431 U.S. 793, 790 (1977); *Dozier v. United States,* 473 F.2d 866, 868 (5th Cir. 1973); *Wathen v. United States,* 527 F.2d 1191, 1200 n.9 (Ct. Cl. 1975), *cert. denied,* 429 U.S. 821 (1976).

If the procedure is found substantially defective because likely to prejudice the rights of individuals subjected to that procedure, the substantive merits of Shidaker's particular retaliation claim are irrelevant. *Greene v. United States,* 376 U.S. 149, 161-62 (1964); *Sullivan v. Dept. of the Navy,* 720 F.2d 1266, 1273-74 (Fed. Cir. 1983); *Ryder v. United States,* 585 F.2d 482, 487-88 (Ct. Cl. 1978). We are thus unconcerned with whether, absent the *ex parte* communication from Santoro to Koenigs, Koenigs would have reached the same decision to demote Shidaker. The test is not whether the procedural defect caused actual prejudice to the rights of the party before the court. *Greene v. United States,* 376 U.S. 149, 161-62 (1964); *Simmons v. United States,* 348 U.S. 397, 405-06 (1955). The test is an objective one, whether the particular procedural defect is so substantial and so likely to cause prejudice that no claimant can fairly be required to be subjected to adverse action under such a flawed proceeding. *United States v.*

Lovasco, 431 U.S. 783, 790 (1977); *Vitarelli v. Seaton*, 359 U.S. 535, 540-46 (1959); *Sangamon Valley Television v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

Although we view this as a close case, we cannot say that the letter from Santoro to Koenigs was such a serious departure from Postal Service procedures that it vitiated the entire process. Even though this was an *ex parte* communication and in violation of Postal Service regulations, the defect was not so substantial that it would unfairly prejudice the rights of claimants reviewed under procedures having this defect.

Certainly other cases have found that certain *ex parte* communications from an adversary to a neutral administrative decision-maker in the context of an employee discharge or demotion were by themselves procedural defects substantial enough to vitiate the entire administrative proceeding. *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978; *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967); *Sangamon Valley Television v. United States*, 269 F.2d 221 (D.C. Cir. 1959). We cannot, however, conclude from these cases, as Shidaker argues, that every *ex parte* communication is sufficient by itself to undermine the integrity of an administrative proceeding. Many other cases have found *ex parte* communications in administrative proceedings to be harmless error. *Pinar v. Dole*, 747 F.2d 899, 906 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2019 (1985); *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 362 (D.C. Cir. 1977); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); *Korman v. United States*, 462 F.2d 1382, 1388 (Ct. Cl. 1972); *Salter v. United States*, 412 F.2d 874 (Ct. Cl. 1969). Not every *ex parte* communication is a procedural defect so substantial and so likely to cause prejudice that it entitles the claimant to an entirely new administrative proceeding.

Several aspects of this *ex parte* communication convince us that it is not such a substantial procedural error that Shidaker or other claimants subjected to such a defective procedure are entitled to a new proceeding. First, the degree of departure from regulatory guidelines was minor. The regulations did not guarantee Shidaker that Santoro would not respond to her answer. They simply gave her the right to answer all charges and allegations made against her before the demotion decision would be made. Therefore, Santoro's letter violated Postal Service procedures only to the extent that it alleged an additional ground for demoting Shidaker. This it did in one sentence stating that "[Shidaker's] community relations also leave much to be desired as evidenced by correspondence previously submitted to you." Although the Postal Service apparently admits that this single sentence was in violation of regulations, we do not find that it amounts to the type of extended, substantial, and adversarial *ex parte* communication in blatant violation of known procedural guidelines that has been found fatally defective in other cases. *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983) (supervisor, angered by employee's filing of grievance against him, instigated investigation by FBI and Naval Investigative Service into employee's work habits, directed department head to recommend employee's removal on basis of evidence discovered in investigation, encouraged hearing officer by *ex parte* communication to recommend employee's removal, and encouraged reviewing officer by repeated *ex parte* phone calls to finalize employee's removal); *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978) (supervisor, who had recommended employee for discharge on grounds of inefficiency, wrote a lengthy signed *ex parte* statement to the officer who was reviewing the hearing examiner's findings, which statement the officer adopted *in toto*); *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967) (attorney, who

represented agency at hearing reviewing agency's discharge of employee, engaged in on-going *ex parte* discussion of case with officials who reviewed that hearing committee's recommendation); *Brown v. United States*, 377 F. Supp. 530 (N.D. Tex. 1974) (prosecutor for agency that discharged employee flew with hearing officer to hearing, discussed case with hearing officer on plane, stayed in hearing officer's hotel, and discussed case after hearing with hearing officer in car on way back to airport).

Second, the "additional ground" alleged in Santoro's letter was "additional" to the charges in the "Proposed Notice of Reduction in Grade" but was cumulative to other information that Koenigs had already reviewed in regard to Shidaker's performance. Santoro's letter itself reveals that Shidaker's poor community relations were "evidenced by correspondence previously submitted." We thus view Santoro's *ex parte* communication less harshly since there is less concern with claimants being unaware of evidence and charges against them when evidence is cumulative to that already before the decision-maker. *Doe v. Hampton*, 566 F.2d 265, 277 (D.C. Cir. 1977) (harmless error where evidence, obtained in violation of regulations and to which claimant had no chance to respond, was cumulative); *Dozier v. United States*. 473 F.2d 866, 868 (5th Cir. 1973) (same); *Salter v. United States*, 412 F.2d 874, 877-78 (Ct. Cl. 1969) (*ex parte* communication harmless error where evidence submitted thereby is cumulative).

Third, the minor procedural error of Santoro's *ex parte* communication was mitigated by Shidaker's knowledge of it, and chance to respond to it, in the full *de novo* hearing at which Koenig's decision was reviewed. We certainly acknowledge that an *ex parte* communication can be so prejudicial that it cannot be "cured" by subsequent review. *Sullivan*, 720 F.2d at 1273; *Ryder*, 585 F.2d at 486-87. Where the communication is already unlikely to do any

harm, however, we are reluctant to require a reviewing agency that discovers a minor procedural error to reinstitute an entirely new proceeding rather than rectify that error by giving the employee full opportunity to respond to the new charges and evidence in the communication. Here, Shidaker knew of the existence and contents of Santoro's letter to Koenigs before the full *de novo* hearing reviewing her demotion. She had full opportunity to respond to the additional charge and present evidence to the contrary. Whatever damage might possibly have been done by the *ex parte* communication Shidaker had full opportunity to undo.

Finally, we are reluctant to apply a stringent procedural standard in this particular case since we are not firmly convinced that the regulations give Shidaker the right to have Koenigs act as a neutral decision-maker. Shidaker was certainly entitled to have Koenigs consider her response to charges against her. This, however, would be a sensible requirement for any agency concerned with demoting only those employees that deserve such adverse action. The regulations can thus be interpreted in two ways: as allowing Koenigs to act adversely to Shidaker in the interest of the Postal Service, or as giving Shidaker the right to have Koenigs act as a neutral decison-maker. Santoro clearly was not required to act neutrally towards Shidaker while the hearing examiner reviewing Koenigs' decision clearly was. The problem is that Koenigs' function lies somewhere in between these two roles of the Postal Service in the administrative review process. Although we do not rest our decision solely on this basis, Koenigs' uncertain role as neutral decision-maker makes us unwilling to apply the high standard of procedural protection designed for adjudicatory proceedings.

III.

We find Shidaker's other bases for appeal to be completely without merit. The district court's findings as to the promotees' qualifications were not undermined by the fact that documents underlying the promotion committee's decision are now unavailable, and there is sufficient evidence to find that Shidaker was demoted for misconduct and poor performance and not in retaliation for challenging her promotion denial as discriminatory.

The judgment of the district court finding that Shidaker failed to make a *prima facie* showing of discriminatory impact is reversed, and Shidaker's disparate impact claim is remanded for further consideration. On remand, Circuit Rule 18 will not apply. The district court's judgment in all other respects is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 82 C 5635

DARLENE SHIDAKER, PLAINTIFF

v.

WILLIAM BOLGER, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE), DEFENDANT

[Aug. 23, 1984]

FINDING OF FACT—CONCLUSIONS OF LAW AND ORDER

WILLIAM T. HART, District Judge.

Plaintiff Darlene Shidaker ("Shidaker") sued her employer William Bolger in his capacity as Postmaster General of the United States Postal Service ("Postal Service"). Count I alleges discriminatory failure to promote under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 and 39 U.S.C. § 409. Count II seeks review of an administrative appeal of Shidaker's reduction in grade by the Postal Service. Plaintiff alleges that the reduction was in retaliation for her attempt to vindicate the alleged discriminatory failure to promote. Judicial review of the entire administrative record of Shidaker's reduction in grade is limited to determining whether the Postal Service's ostensible reason for the grade reduction, Shidaker's alleged poor performance, is supported by substantial evidence and was not arbitrary or capricious. *Coffman v. Bolger*, 590 F.2d 1366 (5th Cir. 1979); *Alsbury*

v. United States Postal Service, 530 F.2d 852 (9th Cir.), *cert. denied* 429 U.S. 828 (1976); *Oates v. United States Postal Service,* 444 F.Supp. 100 (S.D.N.Y.1978).

FINDINGS OF FACT

A hearing was held by the Court. Shidaker was not called as a witness. Based on the final pretrial order, which is incorporated by reference, and the testimony before the Court, the Court finds the following facts, as of the relevant times, many of which are adopted from the parties' statement of uncontested facts:

(1) Shidaker, began her Postal Service career on September 21, 1962, as Acting Postmaster of Kenilworth, Illinois. She was converted to Postmaster, Kenilworth, Illnois on May 8, 1964. This position was a PES-18.

(2) When Shidaker was appointed Acting Postmaster in Kenilworth, Illinois, it was her first employment in any capacity with the Postal Service or its predecessor Post Office Department, United States of America.

(3) Prior to her appointment at Kenilworth, Shidaker's employment experience was as follows:

1956-1958—Executive Secretary, "Business Week" (McGraw-Hill), Chicago, Illinois, earning $350.00 per month;

1958-1961—Office work, Stivers Officer Service, Chicago, Illinois, earning $4.00 per hour;

1961-1962—Office Manager, Jack Bullock & Associates, Chicago, Illinois, earning $100.00 per week.

(4) The Kenilworth Post Office is an associate post office of the North Suburban Metropolitan Service Center ("MSC"). The associate post offices employ approximately 5,000 employees, including postmasters and supervisors. In 1977 there were 108 associate post offices within the North Suburban MSC. Since 1977, one associate post office has been eliminated, leaving 107.

(5) Kenilworth is the smallest of the associate post offices according to the number of city delivery routes and rural delivery routes. It is a "Class C" post office, which embraces the associate post offices with the smallest delivery operations. In "Class C," Kenilworth ranks with the bottom six post offices by size of delivery operations:

Kenilworth	—3 City delivery routes
Fox River Grove	—3 City delivery routes
Genoa	—3 City delivery routes
Marengo	3 City delivery routes and 3 —rural routes
Winfield	—3 City delivery routes
Wihthrop Harbor	—3 City delivery routes

(6) The Kenilworth post office is located in northern Cook County, Illinois. It serves a village with a population of 3,000. The area is not growing and contains only small commercial establishments and no industrial firms. There are three letter carrier routes. At the relevant time, the authorized complement of employees was 11, including a PES-18 postmaster, one supervisor and four part-time employees. Revenue for fiscal year 1977 was $112,297. In 1978, the position of supervisor was eliminated and the post office was downgraded to PES-15.

(7) On August 18, 1977, Shidaker applied for the vacant PES-22 level postmaster positions at Glenview, Palatine, and Franklin Park, Illinois.

(8) Franklin Park is a medium size first class post office, located in the western section of Cook County serving a population of 35,000. The town contains small industrial and commercial firms, several large manufacturing businesses as well as a switch-yard. There are 29 city routes and four auxiliary routes. The authorized complement of employees is 89, which includes a PES-22 postmaster, seven supervisors and 16 part-time employees. Revenue for fiscal year 1977 was $5,453,725 and operating expenses were $1,674,781.

(9) Palatine is a medium size first class post office located in central Cook County in an area of rapid residential and commercial growth. The office serves a population of 70,000. There are 42 city routes, one rural route and three auxiliary routes. The authorized complement of employees is 109, which includes a PES-22 postmaster and six supervisors. Revenue for fiscal year 1977 was $2,588,283 and operating expenses were $2,094,581.

(10) Glenview is a medium size first class post office located in the northern part of Cook County in a area of growing residential and commercial activity. The office serves a population of 52,000. There are 45 city routes and six auxiliary routes. The authorized complement of employees is 114, which includes a PES-22 postmaster and seven supervisors. Revenue for fiscal year 1977 was $3,648,185 and operating expenses were $2,121,720.

(11) Frank J. Santoro ("Santoro") has been Manager of the North Suburban MSC since August 14, 1976. Santoro and his staff supervise the operation of all of the associate post offices within the jurisdiction of the North Suburban MSC. Santoro and his staff are ultimately responsible for the efficient operation of the associate post offices, providing advice and supervision in such areas as mail processing, customer services, finance and employee and labor relations. Santoro also is responsible for the efficient operation of the North Suburban main mail facility which employs approximately 3,000 employees, including Santoro and his staff and the employees who sort the mail for the associate post offices. Santoro is the immediate supervisor of each associate postmaster.

(12) The North Suburban MSC is subordinate to the Northern Illinois District Office, Oakbrook, Illinois. That Office supervises several MSC's in Northern Illinois. Santoro's immediate supervisor is the Manager, Northern Illinois District. The current District Manager is Richard Koenigs. His predecessor was William Booras ("Booras").

(13) The Northern Illinois District is subordinate to the Regional Postmaster General (RPMG) for the Central Region. The Central Region encompasses 13 states, including Illinois. The RPMG and his staff are located in the Main Post Office, 433 W. Van Buren Street, Chicago, Illinois. The Postmaster General, Washington, D.C., is the immediate supervisor of the (RPMG), Central Region as well as the RPMGs for the Northeastern, Eastern, Southern and Western Regions.

(14) During the relevant time period, the Postal Service had an affirmative action program for women, sometimes referred to as the "women's program."

(15) There were a total of 92 applicants for the postmaster positions in Glenview, Palatine, and Franklin Park, and Shidaker was the only female among them.

(16) The Postal Service has a policy of promoting from within. Ordinarily promotions are made one step at a time, *e.g.*, from a PES-20 to 21.

(17) On November 3, 1977, a Postmaster Screening Board, composed of W. Robert Sleep, Postmaster, Northbrook; Ralph Wright, Postmaster, Oak Park and former postal inspector with jurisdiction over the Kenilworth post office; Richard Skala, Director Customer Services North Suburban MSC; and Walter L. Besteda, Director, Employee and Labor Relations, North Suburban MSC, met to review applications and screen candidates for the positions of Postmaster, Glenview, Palatine, and Franklin Park, Illinois. Besteda is black. No woman was on the Screening Board.

(18) The Screening Board did not interview the applicants. Each Screening Board member scored each applicant individually, for each vacancy, and the results were cumulated. In evaluating the applicants, including Shidaker, the Board had available:

> (a) the applicant's "Personal History Summary" which showed the applicant's educational background, including Postal Service courses taken,

Postal Service employment experience, non-Postal Service employment experience, participation in civil, fraternal and professional organizations, and awards;

(b) the applicant's "Estimate of Potential" (PS 2577) prepared and submitted by the applicant's immediate supervisor. Form 2577 rates factors such as "motivation," "personal growth," and "capacity to learn."

(c) the applicant's "Analysis of Experience, Background and Potential" which showed the applicant's experience and performance in such matters as labor relations, Equal Employment Opportunity, decision making (problem solving), budget operations, employee development, supervision, supervision of branch operations, planning and scheduling of work, safety and health, customer and community relations and general observations;

(d) the applicant's personnel file; and

(e) any relevant personal knowledge that the Board members had concerning the applicant's work performance. The Screening Board also had available data concerning the community, employee complement, number of carrier routes and dollar revenue of each of the vacant post offices.

(19) During their meeting on November 3, 1977, the Screening Board first evaluated the applicants to determine those who did not meet the minimal qualifications for the three positions. These applicants were given no consideration for the positions. Eleven male applicants, fifteen male applicants and sixteen male applicants, were not considered minimally qualifed for the postmaster positions in Franklin Park, Palatine, and Glenview, respectively.

(2) The Screening Board next evaluated those applicants, including Shidaker, who were determined to be at

least minimally qualifed for the positions. In evaluating these applicants, each Screening Board member used the following scoring system:

8-7: Outstanding Candidate
6-5: Very Good Candidate
4-3: Acceptable Candidate

When the scores were tallied, the highest score an applicant could receive was thirty-two. The Screening Board decided not to recommend further consideration of those candidates who received less than twenty points.

(21) At each of the three post offices there were one or more applicants who were automatically entitled to be interviewed and considered for the vacant position. The Screening Board did not evaluate these applicants.

(22) In connection with the review of Shidaker for promotion, both Besteda and Wright testified to advising the Screening Board of their first-hand knowledge of the conditions of the post office run by her. Wright, as a postal inspector, had investigated an instance of poor security in connection with the issuance of money orders and he described Shidaker's management as sloppy. Wright stated that he told the Screening Board that Christmas mail deliveries were two or three days late. Besteda also told the Screening Board that the Kenilworth post office was not well managed.

(23) There were 32 applications for the Postmaster of Glenview, and Shidaker was the only female. She received a numerical rating of 13, which placed her in the thirteenth position of 16 qualified applicants. The remaining 16 were deemed unqualified and were not numerically rated. The Screening Board recommended seven male applicants as "qualified and able to assume the duties of the position" at Glenview. Their scores ranged from 20 to 24.

(24) There were 32 applicants for Postmaster of Palatine, and Shidaker was the only female. She received a numerical rating of 11, which placed her in the sixteenth

position of the 17 qualified applicants. The remaining 15 were deemed unqualified and were not numerically rated. The Screening Board recommended seven male applicants as "qualified and able to assume the duties of the position" at Palatine. Their scores ranged from 20 to 24.

(25) There were 28 applicants for Postmaster of Franklin Park, and Shidaker was the only female. She received a numerical rating of 11 which placed her in the fifteenth position of the 17 qualified applicants. The remaining 11 were deemed unqualified and were not numerically rated. The Screening Board recommended seven male applicants as "qualified and able to assume the duties of the position" at Franklin Park. Their scores ranged from 20 to 24.

(26) Plaintiff was not selected for any of the above vacant postmaster positions.

(27) By letters dated December 21, 1977, and January 4, January 5 and March 21, 1978, Santoro sent his immediate supervisor Booras the names of applicants eligible for consideration for the vacancies. Some of the names submitted to Booras were from the lists of applicants recommended by the Screening Board as "qualified and able to assume the duties of the position." The other names sent forward by Santoro were applicants employed at Franklin Park, Palatine and Glenview who had a right to automatic consideration for the vacant positions in their respective offices.

(28) The applicants designated in Santoro's letters to Booras were interviewed by the Regional Management Selection Board ("RMSB") of which Gilbert Brown, Regional Postmaster Selection Officer, was the executive secretary. The RMSB then recommended to the Postmaster General one applicant for consideration for each vacancy on the basis of the applicant's performance during the interview and his qualifications reflected in the materials, *e.g.* personal history summaries, and estimates of potential.

(29) The Postmaster General selected the following applicants to fill the positions:

a. *Postmaster at Franklin Park:*
Robert G. Boeckenhauer ("Boeckenhauer")
Manager, Mail Processing (PES-21)
Des Plaines, Illinois

b. *Postmaster at Palatine:*
James A. Daily ("Daily")
Postmaster (PES-20)
Bloomingdale, Illinois

c. *Postmaster at Glenview:*
William J. Soto ("Soto")
Postmaster (PES-18)
Algonquin, Illinois

Soto's name was not among those initially submitted by Booras for consideration for the Glenview vacancy. He had received only 19 points when he was evaluated by the Screening Board. However, some of those candidates who had earned 20 points and had been submitted for consideration withdrew. Thereafter, Santoro added Soto's name to the list of applicants to be considered for Glenview.

(30) Boeckenhauer's promotion was from a PES-21 position. He had 21 years of service and was serving in grade 21 since March of 1973. The Des Plaines Post Office is grade level PES-24. It serves a population of 105,000. There are 83 regular and three auxiliary routes. The authorized complement of employees is 232 including 14 supervisors.

(31) Daily's promotion was from PES-20. He had 12 years of service and was serving in grade 20 since August of 1975 as postmaster of the Bloomingdale, Illinois 60108 post office. That post office serves a population of 11,500. It is grade level PES-20. There are six regular and three auxiliary routes. The authorized complement of employees is 16 including one supervisor.

(32) Soto's promotion was from PES-18. He had 15 years of service and was serving in grade 18 since being appointed postmaster of Algonquin, Illinois in November of 1974. Algonquin, Illinois 60102 serves a population of 14,000. It is grade level PES-18. There are three regular and one auxiliary routes. The authorized complement of employees is 15 including one supervisor and five part-time employees. Revenues for fiscal year 1977 were $237,000 and operating expenses were $259,325. Soto's entry level position with the Postal Service was at level four, as a temporary carrier at Geneva, Illinois. He received six promotions before being appointed postmaster at Algonquin.

(33) The selected candidates were all given positive ratings by their immediate supervisors.

(34) During 1977 and 1978 the statistical breakdown by gender of the Postal Service's work force in the North Suburban MSC was as follows:

PES Level	*M*	*F*	*%F*
1-27	5,309	2,208	29.4
19-27	76	4	5.0

(35) According to data introduced by Shidaker in November 1974, there were 20.8% women in the Postal Service's workforce nationally, including postmasters. In the first quarter of 1980, the percentage was 23.51%. In January of 1980, women held 11.5% of the national Postal Service positions in PES levels 15 and above.

In 1978, women held 23 or 21.2% of the 108 postmaster positions in the North Suburban MSC. None of them was ranked higher than PES-20. The breakdown is:

PES-20 – 2
PES-18 – 4
PES-17 – 2
PES-15 – 5
PES-12 – 9
PES-03 – 1

(36) No evidence of applicant flow was presented.

(37) On April 28, 1978, Shidaker filed an Equal Employment Opportunity ("EEO") complaint alleging that she was denied promotion to the PES-22 level postmaster positions on the basis of sex.

(38) On February 27, 1980, a hearing on Shidaker's complaint was held before Equal Employment Opportunity Commission ("EEOC") Complaint Examiner Robert Johnson ("Johnson").

(39) In a decision dated September 2, 1982, Johnson found that Shidaker was denied promotion on the basis of sex. He also found that the procedure used by the Postal Service to make the promotions had a discriminatory impact on women. He did not, however, find discriminatory the fact that no woman was on the Screening Board.

(40) In a letter dated October 25, 1982, the Postal Service's Regional Director for Employee and Labor Relations Central Region, informed Shidaker that the Postal Service was rejecting Johnson's decision of September 2, 1982.

(41) While Shidaker's EEO complaint was pending, Santoro rated her "marginal" on her merit performance evaluations for fiscal years 1980 and 1981. Prior to 1980 she had never received anything less than a "satisfactory" rating. A marginal rating denies an employee a salary increase.

(42) No female postmasters except Shidaker received "unsatisfactory" or "marginal" merit evaluations in 1980, 1981, and 1982. Santoro gave three male postmasters "unsatisfactory" merit evaluations in 1978. In 1979, Santoro gave two male postmasters "marginal" merit ratings. In 1980, Santoro gave three male postmasters "marginal" ratings. In 1981, Santoro gave one male postmaster a marginal rating. In 1982, Shidaker was the only postmaster to receive a "marginal" rating. In 1983, two male postmasters were given "marginal" ratings.

(43) Santoro's written comments accompanying Shidaker's evaluation in 1980 indicate:

> Ms. Shidaker rated herself "Good" but she received a "Marginal" rating because of poor performance in all major areas of her office. Blames her supervisor for performance of office. Negative performance in carrier operation of 8.2% even after discounting Accounting Periods 4 and 5 due to severe weather. Clerk productivity down 1.7% vs SPLY [Same Period Last Year]. Needs to become more directly involved in office operations and to improve her attitude and cooperation with MSC staff. [Bracketed words added].

(44) On April 28, 1980, Shidaker was issued a "Proposed Notice of Adverse Action." The Notice informed her that Santoro proposed to remove (discharge) her from employment for incidents of "misappropriation and personal use of postal funds," and for "misrepresentation of work hours." The dates alleged were October 8, 1978, August 17, 1979, November 19, 1979 and January 17, 1980. The incidents involved the alleged unauthorized issuance of postal money orders in the amounts of $20.00 and $35.00 for personal annual membership fees in an organization called "Women In Management," the unauthorized purchase with Postal Service funds of a Village of Kenilworth motor vehicle sticker for Shidaker's personal automobile; and taking 32 hours of leave but knowingly entering the time as worked on her time card rather than charging the absence to annual leave.

(45) On September 3, 1980, Shidaker, who was represented by counsel, entered into an EEO settlement of the notice of removal. The settlement agreement provided, in pertinent part, that she would be reduced "from a step

six to step three in the EAS[1] 18 pay scale." This reduction in pay amounted to approximately Three Thousand Dollars ($3,000.00).

(46) In 1981, Santoro wrote on Shidaker's evaluation form: "Employee rated 'marginal' because of misappropriation of postal funds."

(47) On February 8, 1982, Santoro issued Shidaker a "Proposed Notice of Reduction in Grade." It was proposed that due to her alleged official misconduct she be reduced from Postmaster, Kenilworth, Illinois, PES-18 at a salary of $26,300, to a full-time distribution clerk, PES-5, Step 12, at a salary of $22,325.00.

(48) Shidaker ultimately was reduced in grade to a level PES-5, full-time regular distribution clerk.

(49) On February 18, 1982, Shidaker filed a written EEO complaint, claiming that the February 8, 1982 notice of grade reduction was issued in reprisal for filing on April 28, 1978 her EEO administrative complaint concerning the failure to be promoted. She scheduled an appointment to discuss the prior EEO complaint with a Postal Service EEO Investigator.

(50) Shidaker previously had filed timely EEO complaints alleging that the marginal ratings for 1980 and 1981 were issued in retaliation for her filing of the EEO complaint in 1978. By a decision dated August 6, 1982, the EEOC issued a final administrative determination that Shidaker's marginal rating for fiscal years 1980 and 1981 did not violate Title VII. Shidaker renewed the claims of retaliation in her civil complaint but abandoned them before trial.

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[1] There is some confusion over the designation of pay scale categories, *i.e.*, "PES, "PMS" or "EAS." Each designation likely is correct, depending on the year in question. For example, in 1980 the "EAS" designation apparently replaced the "PES" rating. For ease the Court adopted the "PES" designation, except where the rating appears within a quotation.

(51) Shidaker also filed an administrative appeal from her reduction to a PES-5 distribution clerk. By letter dated March 1, 1983, the Postal Service informed her that its final decision was that the charges against her were supported by the evidence and warranted the reduction.

(52) The meaning and purpose of the 16 item Model Delivery Office ("MDO) Checklist," which is part of the Postal Service's Exhibit 22, is as follows:

Item 1. "Minimum—80% Mail Volume
a. Mail ledged for carrier."

The purpose of Item 1 is to have at least 80% of the morning mail volume at each post office sorted by the clerks and at each letter carrier's sorting case when the carrier starts work. Before the carrier leaves the post office to deliver his or her route, he or she must "case" the mail that is, sort it in sequence of delivery, by street and address. The carrier "cases" the mail by sorting it into designated separations ("pigeon holes") in the carrier's case. Each carrier case has a "mail ledge" at the front of the case where the mail is placed for "casing." The mail is placed on the ledge, stamp side down and to the carrier's right hand side to ensure efficient casing.

Item 3. "DUVRS
a. Data used for workhour decisions."

"DUVRS" means "Delivery Unit Volume Recording System." It requires the measurement with a foot rule of the daily mail volume ultimately delivered by the letter carrier. It is estimated that a linear foot of letter size mail contains 250 pieces. "Flats", such as magazines and other magazine size mail, contain 115 pieces per linear foot. These daily measurements are made so that supervisory and managerial employees can decide whether a carrier needs overtime, auxiliary assistance by another carrier or curtailment of mail on a given day or whether individual carriers have insufficent volume ("undertime") to fill an eight hour day.

Item 4. "Workload Leveling."

The objective of workload leveling is to ensure that each carrier has sufficient mail to fill an eight hour day. "Leveling" is achieved by curtailing the delivery of mail on a given day and also by dividing mail between carriers so that each has enough mail to fill an eight hour day.

Item 5. "Carrier Control Forms."

Item 5 requires the daily review of workhour control forms and mail volume curtailment forms. The purpose of this review is *inter alia* to reduce the need to curtail the delivery of mail; to eliminate problems of carriers leaving the office late to deliver their routes; to eliminate problems of late delivery of mail; to eliminate problems of excess overtime; and to correct problems of carrier work methods.

Item 6. "Pivoting."

Pivoting involves assigning carriers having "undertime" to assist carriers who have more mail than they can deliver in eight hours. Effective pivoting requires daily knowledge of the mail volume of each carrier.

Item 7. "Reporting Times.
a. Supervisors
b. Carriers
(1) 80% Mail Volume
(2) FLSA"

This item requires that the starting times of supervisors and carriers be checked and coordinated so that the supervisor, or other responsible person, starts work ahead of the carriers to ensure *inter alia* that 80% of the mail volume is sorted by the clerks and at the carrier's case when the carrier starts work. It also is required that the carrier's starting time be scheduled so that the carrier does not start before the 80% requirement is met.

The Fair Labor Standards Act ("FLSA") aspect of the program requires responsible management or supervisory personnel to monitor the times that employees punch in and out, or otherwise start and end work, so that they do so at appropriate times in order to avoid unearned overtime under FLSA.

Item 8. "Park Points."

a. Five or less unless otherwise justified.

Letter carriers who drive their routes, drive to various points, park and lock their vehicles and deliver a portion of the mail. The purpose of restricting parking points to five or fewer points is to save gasoline, unnecessary mileage and time otherwise lost by unnecessary parking and locking and mounting and dismounting the vehicle.

Item 9. "Relays.

a. Weighted In Office."

A relay is a segment of a carrier's route which weighs approximately 30 pounds, the weight a carrier carries and delivers at a given time. The relays are weighed at the post office so that the 30 pound requirement is met for each relay. The purpose is to assure the minimum possible relays thereby avoiding unnecessary relays and wasted time.

Item 10. "Office Supervision."

The purpose of office supervision is to ensure that employees observe proper starting and stopping times, use efficient work methods and observe the other rules of the workplace.

Item 11. "Street Supervision."

The purpose of street supervision is to ensure that carriers are using efficient work methods and observing pertinent work rules. Street supervision includes checking whether the carrier is taking appropriate short cuts,

following efficient delivery patterns, unnecessarily deviating from the route and taking lunch and other breaks at designated times and locations.

Item 12. "Mobile Accountable Cart."

Item 12 is a system by which accountable mail, *e.g.*, registered, certified, C.O.D. and postage due mail, is brought to the carrier at his or her case in order to save time.

Item 13. "Parking and Loading."

The purposes of "Parking and Loading" include checking for the most efficient parking places for Postal Service vehicles in order to avoid interference with official vehicle operations and designated customer parkings; and checking whether employees efficiently load vehicles for sequential route delivery; make a minimum number of trips from office to the vehicle; and how they transport mail to the vehicle.

Item 14. "Review PS Forms 4570."

A PS Form 4570 is a Vehicle Trip Report, documents daily starting and ending times and mileage. Its purpose is to ensure proper utilizaton of the vehicle. For example, review of the forms ensures that the reports are made; forms are accurately filled in; unauthorized mileage is not used; and mileage rates are accurate.

Item 15. "Carrier Route Books."

Route books are checked to verify that they contain required information. For example, they must contain the route map; any special instructions for the route; the form which reflects designated break and lunch times and designated lunch locations; and the M-41 handbook which is the carrier work method book.

Item 16. "Carrier Case Labels."

These are strip labels of various colors ("color coded") which bear the street name and delivery addresses in delivery sequence. These labels are affixed to the appropriate pigeon holes in the letter carrier's sorting case. It is required that the labels be typewritten and color coded. Color coding results in separations for letters and flats with the same destination bearing the same color.

(53) Defendant's Exhibit 64 is a "Daily Condition Report" form. It is used during specified accounting periods, including the Christmas season period of heaviest mail volume. Column 1 lists four post offices within the North Suburban MSC. Lake Bluff, Kenilworth and Morton Grove are required to call in to the Park Ridge Post Office the information in columns two through eight daily by a specified time. Column two reports the number of city delivery routes. Column three reports the total number of trays, 500 pieces of first class ("pref") mail per tray that the clerks have not sorted by their "cut off time," the time they were required to stop sorting mail. "Pref mail" includes personal letters, registered letters, and certified return, receipt mail. "Non Pref" mail includes magazines and advertisements. Column four reports the total number of trays of "pref" mail that have not been sent to the carriers' cases at the clerks' cut off time. Column five reports the number of carrier routes which have curtailed, *i.e.*, not to be delivered, "pref" mail. Column six reports the number of routes with three or more trays of curtailed "pref" mail. Column seven reports any "nonpref" mail more than one day behind in delivery. Column eight reports any parcel post mail more than one day behind in delivery.

One of the main reasons for acquiring this daily information during the Christmas season is to ensure the timely delivery of the mail by post office to post office assistants

and other means. Management personnel also need this daily information so that they can readily answer inquiries from the public concerning the status of mail delivery during the peak season.

CONCLUSIONS OF LAW

Shidaker attempts two theories for proving a Title VII violation relative to her failure to win promotion: (1) the Postal Service's procedure for selecting candidates for promotion to postmaster has a "disparate impact" on women; and (2) the Postal Service intentionally discriminated against her by promoting a male instead of her, although she was qualified.

DISCRIMINATORY IMPACT

A plaintiff makes a *prima facie* case of discriminatory impact merely by showing that the employer's facially neutral criteria for hiring or promotion have an adverse impact on a protected class to which he or she belongs. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 153 (1971). Unlike a case of "disparate treatment," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817. 30 L.Ed.2d 668 (1973), proof of wrongful motive is not required. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). Where an individual brings a discriminatory impact claim, a *prima facie* showing is not overcome by the employer's subsequent attempt to minimize the discriminatory impact of the procedure by favoring some members of the protected group. Title VII provides an *equal* opportunity for each applicant, and " '[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.' " *Connecticut v. Teal*, 457 U.S. 440, 454-55, 102 S.Ct. 2525, 2534-2535,

73 L.Ed.2d 130 (1982), quoting *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978).

Prima facie adverse impact is demonstrated by various statistical means, depending on the nature of the challenged practice and the employer. Regardless of the method chosen, the plaintiff must present supporting statistical data with some degree of precision. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); *Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990 (7th Cir.1983). In limited circumstances, a court may project disparate impact from non-statistical data. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.3d 786 (1977); *Carpenter v. Board of Regents*, 728 F.2d 911, 914 (7th Cir.1984).

If adverse impact can be inferred from plaintiff's data, the employer may present evidence indicating that the challenged practice or rule is a "business necessity." *Griggs v. Duke Power Co., supra.* The practice or rule must bear a manifest relation to the job in question. *Id.*, 401 U.S. at 432, 91 S.Ct. at 851. *See also Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178, 1186 (7th Cir.), *cert. denied* 449 U.S. 1033, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980).

If the employer shows that the challenged procedure is necessary to its business, the plaintiff may show that the rule actually is a pretext for discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). It is at this juncture only that the employer's motive is tested. *New York City Transit Authority v. Beazer, supra.* A plaintiff may demonstrate pretext by showing that other, non-discriminatory, selection criteria would serve the employer's purpose as well. *Carpenter v. Board of Regents, supra.*

The burden of proving discriminatory impact remains with Shidaker throughout the inquiry. Only the burden of going forward is imposed upon the Postal Service if a *prima facie* showing of discriminatory impact is made. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

As a threshold matter, it is arguable whether disparate impact analysis is even proper here where the system attacked includes both objective and subjective parts. The Eighth Circuit addressed the question and holds that "[a] subjective decision-making system cannot *alone* form the foundation for a discriminatory impact case." (emphasis added). *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir.1981). *See also Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir.1983), *cert. denied* 104 S.Ct. 2155, 80 L.Ed.2d 541 (1984). The Seventh Circuit recently noted the issue, but found it unnecessary to resolve. *Soria v. Ozinga Brothers, Inc.*, *supra*.

The use of subjective criteria is not unlawful *per se*. *See e.g., Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975). The question is do the selection criteria, objective or subjective, impermissibly burden a person in a protected group. Thus discriminatory impact analysis may be applied here, though the procedure which is challenged consists of subjective parts.

The validity of subjective devices increases in direct proportion to the level of employment sought. In cases where the skills sought are minimal or can be objectively quantified, or the position is entry level, courts reject as illegitimate purely subjective evaluations of potential or fitness. *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir.1981); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir.1972).

In contrast, while objective factors may play a threshold role in professional or entry level management positions, decisions as to promotions at these levels likely turn on an evaluation of more intangible subjective qualities, such as leadership skill and ability to take decisive action when necessary. However, even subjective tests for upper level employees and professionals will not withstand scrutiny unless the underlying goals are clear and job-related. *See, e.g., Davis v. Board of School Commissioners*, 600 F.2d 470, 474-75 (5th Cir. 1979) (principal); *Peters v. Lieuallen*, 568 F.Supp. 261, 266 (D.Or.1983) (compliance officers, state department of higher education). *But see Leisner v. New York Telephone Co.*, 358 F.Supp. 359 (S.D.N.Y.1973) (interviews for women in management rejected). *See also Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir.1977) (husband and wife); discriminatory intent cases: *Harris v. Group Health Association, Inc.*, 662 F.2d 869 (D.C.Cir.1981) (doctor); *Frausto v. Legal Aid Society of San Diego, Inc.*, 563 F.2d 1324 (9th Cir.1977) (attorney); *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir.), *cert. denied* 439 U.S. 984, 99 S.Ct. 570, 58 L.Ed.2d 656 (1978) (professor); *Chalk v. Secretary of Labor*, 565 F.2d 764 (D.C.Cir.1977), *cert. denied* 435 U.S. 945, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978) (writer/editor).

Although it is appropriate to use disparate impact analysis, Shidaker fails to make out a *prima facie* case of disparate impact. The statistics presented to the Court are as follows: In November, 1974, women held 20.8% of the positions in the Postal Service workforce. The percentage had moved to 23.5% by November, 1980. Nationally, women held 11.5% of the positions at PES-15 and above in January, 1980.

In 1978, the year of Shidaker's failed promotion, women occupied 23 of the 108 postmaster positions in the North Suburban MSC, or 21.2% of the total postmaster

positions. However, none of the women postmasters were rated higher than PES-20 and 15 of them were at level PES-15 or lower. Additionally in 1977-1978 a total of 2,008 women were employed in the North Suburban MSC, 29.4% of the entire Postal Service workforce in the area. Despite that overall percentage, only four women or 5% were rated in positions of PES-19 or higher. Grossly, the disparities could be significant.

However, aside from informing the Court that she was the only female applicant for the three PES-22 postmaster vacancies in 1977, Shidaker presented no other evidence of applicant flow. The Court was not informed of how many women, if any, had applied for X number of vacant postmaster positions, of any level, in the past. Nor does the Court know how many women even were eligible to apply for the 1977 or past vacancies. No breakdown of the number of women in each PES position by year was presented. Without such basic data, the impact of the Postal Service's promotion procedure cannot be fairly tested.

The use of statistics in investigation of management discrimination is complicated by the problem of defining the relevant labor pool. Lower level jobs require skills present or readily acquired by persons in those categories. Such an assumption does not apply to management jobs which demand skills and training possessed by relatively few individuals. Accordingly, the absence of applicant flow data is a serious deficiency in Shidaker's proof. Although expert testimony is not required in every case, no presentation was made to analyze or probe the limited data which were presented.

The paucity of data also prevented the Court from testing for adverse impact by reference to the "Four-Fifths Adverse Impact Rule" utilized by the EEOC. 29 C.F.R. ¶ 1607.4. Under this approach, a selection rate is determined by examining the employer's actual experience in

hiring or promoting, and comparing the percentage of minority applicants with nonminority applicants who are hired. If "[a] selection rate for any race, sex or ethnic group . . . is less than four-fifths (4/5) of the rate for the group with the highest rate," the selection process normally has an adverse impact. *Id.*

Having failed to prove a *prima facie* case of discriminatory impact, it is unnecessary for the Postal Service to prove whether its promotion procedure was a business necessity.

DISPARATE TREATMENT

The Court concludes that Shidaker has made a *prima facie* showing of disparate treatment in accordance with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973):[2]

(1) she belongs to a group protected by Title VII;

(2) she was at least as qualified for promotion as one of the candidates selected;

(3) she was considered but denied promotion; and

(4) the jobs that she sought were filled by men.

Of the three candidates promoted to the positions sought by Shidaker, two of them were more qualified when judged only by objective criteria. Prior to promotion, Boeckenhauer was a PES-21 postmaster in Des Plaines. The Des Plaines Post Office was roughly comparable to any of the three post offices with vacancies. It served a population of 105,000, with 88 regular mail routes and utilized 232 employees. Boeckenhauer had been with the post office for 21 years, four of which were at grade PES-21.

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[2] There is some doubt in this Circuit whether the McDonnell Douglas standards for *prima facie* disparate treatment apply in promotion cases, where the criteria are subjective and the evaluation is comparative. *Mason v. Continental Illinois National Bank*, 704 F.2d 361 (7th Cir.1983).

Daily had 12 years of service, with two years in grade PES-20. He managed the Bloomingdale Post Office, which served a population of 11,500, with six regular routes and 16 employees. Although the difference between Shidaker's qualifications and Daily's is not as dramatic as the difference between those of Shidaker and Boeckenhauer, a marked difference nonetheless exists. While Shidaker had 15 years experience, 13 of which were at PES-18, all her service was at the Kenilworth Post Office, one of the six smallest in the North Suburban MSC. Kenilworth's population is almost four times smaller than Bloomingdale's, and it had one half as many delivery routes. Furthermore, Shidaker was responsible for only six full-time employees, the other four positions authorized were part-time positions.

The Postal Service has demonstrated that Boeckenhauer and Daily were selected for their superior qualifications. In *Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 1201-02 (7th Cir.1980), the Seventh Circuit stated

> [a] desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate and common reason on which to base a hiring decision. Thus . . . plaintiff must foreclose this possible explanation for a hiring decision before a *prima facie* case is established.

By inference, the Title VII plaintiff in this Circuit must allege that he or she is as qualifed or more qualified than those persons who received the position sought by the plaintiff. *See also Mason v. Continental Illinois National Bank*, 704 F.2d at 364. ("No rational enterprise that has several qualified candidates for a position selects among them by lot, it picks the best qualified").

Thus if Shidaker is to prevail at all, it must be by demonstrating first that she is as qualified as Soto and second that the Postal Service promoted Soto instead of her for discriminatory reasons. Shidaker and Soto each were

rated as PES-18 postmasters and had been employed by the Postal Service for 15 years. Furthermore, both the Algonquin and Kenilworth Post Offices had only three regular delivery routes. On one level, it appears that Shidaker was more qualified for promotion than Soto. Shidaker served in a PES-18 position for 13 years, while Soto was in that grade for fewer than three years. That "deficiency" in Soto, however, is balanced by the fact that Soto entered the Postal Service as a level four employee and received six promotions before his appointment as postmaster in Algonquin. Shidaker's position as a PES-18 was an entry level position. Another leveling factor is that the Algonquin Post Office serves a population area more than three times the size of the Kenilworth Post Office, thereby exposing its postmaster to a greater degree of financial transactions and experience. Finally, at Algonquin, Soto was in charge of 15 employees including one supervisor and five part-timers. Shidaker's authority extended over ten employees including five part-timers.

Although the case is close, the Court finds that on balance Shidaker and Soto were roughly of equal qualifications.[3] Shidaker has made out a *prima facie* case of disparate treatment. The burden of going forward now shifts to the Postal Service to articulate a legitimate, nondiscriminatory reason for denying the promotions to Shidaker. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green, supra.*

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[3] The Court could have found that Shidaker was not even minimally qualified and, therefore, that no *prima facie* case was proved. The Screening Board established that no candidate with less than 20 points would be recommended. That finding was rejected, however, as the Court considered instead the grosser qualifications of longevity and level of service to constitute minimal qualifications. Soto was not awarded 20 points as a composite score by the Screening Board either.

The Postal Service states that the reason for selecting Soto over Shidaker was that Shidaker was not recommended by the Screening Board. Her composite score for each vacancy was below 20, which was the cutoff score between recommendation and not. Soto's composite score for the Glenview vacancy was 19, and he also was not recommended initially. His name was put forward only after those candidates with higher scores either dropped out or were otherwise eliminated. Soto and one other candidate had the next highest scores of 19. It is irrelevant whether both of the men who earned scores of 19 were then recommended. What is important is that *a* next most qualified candidate was recommended and ultimately selected. The reason that Soto was elevated into the running, *i.e.*, his higher composite score, is a legitimate, nondiscriminatory business reason—if the process used to arrive at that score is valid under the circumstances.

The Postal Service has demonstrated that the persons selected to fill the vacancies were required to have high levels of management skills. Each post office vacancy to be filled, including the Glenview office to which Soto was promoted, was designated "medium size, first class," served populations ranging in size from 35,000 to 70,000, included commercial and industrial firms, had from 29 to 42 regular delivery routes, and was growing. The postmasters chosen would supervise between 89 to 114 employees and be responsible for annual revenue of up to $5.5 million.

To probe the managerial ability of the applicants, a Screening Board, which included one minority member, was appointed and given previously compiled records of each applicant. Those records included both Postal Service and non-Postal Service histories. Of particular relevance was material on each applicant's experience and performance in employee relations, budget operations and planning and scheduling of work. To the historical data

was added an "Estimate of Potential," prepared by the applicant's immediate supervisor. The Estimate rated the applicant on factors such as motivation, personal growth and learning capacity.

The initial scores assigned to each applicant were derived by each screener without consultation with the others, thereby minimizing the possible force of anecdotal influence in the first scoring. Each applicant was separately rated for each vacancy sought. Although the screeners later added their specific, firsthand observations about Shidaker's work style and managerial ability, (and presumably about the other applicants), those observations were pertinent to the skills required for the positions sought.

While most of the material relied upon by the screeners was subjectively derived, the Screening Board made an effort to objectify its decision by applying a point system to the findings, considering each vacancy separately and then by comparing each candidate to the others. Each candidate who was not automatically entitled to be recommended for interview, was required to be evaluated by this same subjective/objective process. The Court finds that the procedure used by the Postal Service to initially select candidates for promotion consideration was permissible and without overt indicia of discrimination.

It remains only to decide whether the Postal Service erred by selecting Soto instead of Shidaker. It did not. There is no obligation under Title VII requiring an employer to integrate its workforce or make gender-preferential promotions where all candidates are equal or minimally qualified. *Texas Department of Community Affairs* v. *Burdine, supra.* "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* at 259. 101 S.Ct. at 1097. Similarly, outside the factory setting the first qualified applicant need not be selected where

a choice is made " 'on the basis of qualifications, recommendations and subjective impressions.' " *Mason* v. *Continental Illinois National Bank,* 704 F.2d at 365, quoting *Loeb* v. *Textron, Inc.,* 600 F.2d 1003, 1017, n. 18 (1st Cir.1979).

Where, as here, the promotion selection among minimally and arguably equally qualified applicants was made for a legitimate business reason, and no evidence of purposeful discrimination is offered, a plaintiff cannot show that the employer's proffered reasons are pretext. Shidaker cannot rebut by showing that "but for" gender discrimination she would have been selected. *See McCluney* v. *Joseph Schlitz Brewing Co.,* 728 F.2d 924, 928 (7th Cir. 1984); *Sherkow* v. *State of Wisconsin, Department of Public Instruction,* 630 F.2d 498, 502 (7th Cir.1980). Shidaker has not proved, by a preponderance of the evidence, that the Postal Service failed to promote her because she was a woman.

RETALIATORY REDUCTION IN GRADE

The matter of administrative review of Shidaker's reduction in grade was presented to the Court without supporting briefs discussing the evidence or, with one exception, oral argument pointing out in what respect Shidaker claims the hearing officer erred. That exception relates to Shidaker's claim that she did not receive a copy of a letter sent by Santoro to a higher authority after Shidaker's response to the damages for grade reduction. The Court has reviewed the administrative record and the notice of reduction in grade and finds that the decision to reduce is supported by substantial evidence.

The charges in the notice to reduce which were found to be substantial after administrative review were (1) failure to follow management's instructions; (2) failure to timely report status of mail and failure to follow managerial instructions; (3) failure to train an employee to assume re-

sponsibility in Shidaker's absence; (4) falsely accusing an employee of serious misconduct; and (5) failure to take disciplinary actions against an employee despite management's instructions to do so. Shidaker also had been notified that her reduction was due to a failure to file reports of status mail during the Christmas 1981 period and misrepresentation of work hours. However those charges were not sustained.

A review of the relevant evidence in support of the finding for grade reduction is: Shidaker persistently ignored or disobeyed repeated instructions to bring her office into compliance with the Fair Labor Standards Act by correcting numerous time-keeping and pay computation errors involving straight time, overtime and night differential pay for her employees. Ultimately, personnel at the North Suburban MSC had to prepare the necessary corrected forms and send them to Shidaker for her signature. Shidaker's failure to make these corrections cost the Postal Service $356.00.

Despite notice of the MDO program and its efficiency goals, and training and instructional visits by members of the MSC staff, Shidaker failed to bring her post office into compliance with several items of the program: Item 1, requiring the availability of 90% of the mail volume for the letter carriers when they report for work; Item 3, "DUVRS," whish is data used for work hour decisions; Item 4, workload leveling; Item 5, carrier control forms; Item 7, reporting work hours of supervisors and carriers; Item 8, park points—5 or less unless otherwise justified; Item 9, relays; Item 10, office supervision; Item 11, street supervision; Item 12, mobile accountable cart; Item 14, Review PS (Postal Service) forms 4570; Item 15, carrier route books.

Shidaker also failed, despite repeated instructions, to change her starting time to 8:00 a.m. so that she could "assign auxiliary assistance or overtime" for the letter

carriers and make any decisions necessary to expedite the sorting and casing of the mail; to appoint and train an acting supervisor (204B supervisor) who could serve in her absence; and to submit a 16 point MDO check list reflecting the dates by which she proposed to implement the 16 MDO items or the dates on which she had implemented the items.

All postmasters in the North Suburban MSC were instructed to complete the "Daily Condition Report," which is a seven (7) item report concerning the status of mail in their post offices, during the period December 10-24, 1981. They also were instructed to report the information daily by telephone to a designated post office. Shidaker failed to make her report in a timely manner to the Park Ridge Post Office on Saturday, December 12, Monday, December 14, and Thursday, December 17, 1981. When requested to explain this failure, Shidaker's response to one MSC manager was, "Cool it man." When Santoro requested an explanation, Shidaker accused Santoro of being "completely out of line" and of having "very poor judgment."

Shidaker failed to comply with Santoro's July 27, 1981 order that she train an employee to serve as an acting supervisor (204B supervisor) during her absences. She also failed to comply with Santoro's subsequent order of August 5, 1981. On December 16, 1981, almost five (5) months later, Shidaker requested a level 13 supervisor to cover the Kenilworth post office during her forthcoming three weeks of leave.

In a letter to Santoro dated July 28, 1981, Shidaker accused Charles Fargo, a full-time clerk in Kenilworth, of falsifying time cards, falsifying mail volume reports and writing a partially obscene letter during work time. When Postal Inspectors investigated, Shidaker could produce no records or other evidence of such falsifications although such falsifications are felonies under federal law.

Nonetheless, Shidaker told the inspectors that Fargo also had misused a "penalty indicia" Postal Service envelope in connection with the later. When the Postal Inspectors indicated that they would question Fargo, Shidaker then said that her accusations were intended only to oppose Fargo's elevation to the position of acting supervisor, Kenilworth. Although Shidaker was repeatedly instructed to take corrective actions against employee Montoya, who actually wrote the letter and misused the penalty envelope, she refused to do so. Misuse of a penalty envelope is a federal crime.

Shidaker also complains that after she answered charges made against her by Santoro, Santoro responded to his higher authority without sending her a copy of his response to her answer. Any procedural error committed by not sending her a copy of Santoro's response was cured by the fact that the entire administrative record was available to Shidadker when the matter was heard by the appointed hearing officer.

The Court finds that there is substantial evidence in the record to support the finding of the Postal Service that Shidaker was not reduced from Postmaster PES-18 to full-time distribution clerk, PES-5, step 12 in reprisal for filing the April 28, 1978 EEO complaint. The reduction was the result of Shidaker's misconduct and poor work performance, as specified in the proposed notice to reduce her from postmaster to clerk and set forth in the above Findings of Fact. Therefore, the decision to reduce Shidaker in grade was neither arbitrary nor capricious.

IT IS THEREFORE found that

(1) Shidaker has failed to prove sexual discrimination in promotion by either a disparate impact or disparate treatment theory.

(2) There is substantial evidence in the administrative record to support the finding of the Postal Service that Shidaker was demoted in grade for misfeasance and mal-

feasance and not in retaliation for pursuing her civil rights claim.

(3) The Court finds the issues in favor of the Postal Service and against Darlene Shidaker. Accordingly, the complaint is dismissed with prejudice.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 84-2791

DARLENE SHIDAKER, PLAINTIFF-APPELLANT,

v.

WILLIAM BOLGER, IN HIS CAPACITY AS POSTMASTER GENERAL (UNITED STATES POSTAL SERVICE),
DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

[MAY 1, 1986]

ORDER

HON. WALTER J. CUMMINGS, Chief Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by Albert V. Casey, appellee, (now Postmaster General of the United States Postal Service), and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion of rehearing *en banc*. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby DENIED.

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-468

In The

Supreme Court of the United States

October Term, 1986

PRESTON R. TISCH, in his capacity as Postmaster General of the United States Postal Serivice,

Petitioner,

v.

DARLENE SHIDAKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHEN G. SELIGER
180 N. LaSalle Street
Suite 1101
Chicago, IL 60601
(312) 346-5255

Pandick Technologies, Inc., Chicago • (312) 236-0200

23 pp

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No. 86-468

In The
Supreme Court of the United States
October Term, 1986

PRESTON R. TISCH, in his capacity as Postmaster General of the United States Postal Serivice,

Petitioner,

v.

DARLENE SHIDAKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Darlene Shidaker, the plaintiff below, files this brief in opposition to the petition for writ of certiorari of Preston R. Tisch, Postmaster General of the United States.

PRELIMINARY STATEMENT

Petitioner posits two arguments in support of granting the petition for writ of certiorari. First, he claims that the promotion procedures complained of by the respondent were "subjective" and should therefore not be considered under a disparate impact model. Second, he asserts that the workforce statistics presented by the respondent are insufficient to establish a *prima facie* case.

The primary issue presented by the petitioner–that the procedures were subjective–has no support in the record and is not raised in this case. Rather, the evidence demonstrates that the promotion procedures and criteria were, in fact, objective. The district court specifically found that the promotion procedures were, in part, objective and that steps were made to objectify the decision making.

Further undermining the petitioner's position is that counsel for the petitioner, contrary to the position he now takes in this Court, consistently argued to the district court that the promotion procedures and criteria were, in fact, objective, and urged the district court to make that finding. Neither did the petitioner appeal the findings of the district court that the procedures were objective.

Thus, if the Court accepts this case for review, it will be required to weigh evidence and reverse findings of fact before ever reaching the issues raised by the petitioner. The Court will also be required to grapple with the fact that petitioner himself asserted a position directly contrary to the one he now argues.

With respect to the statistical issue, petitioner argues here that these statistics are weak, but this again is a factual issue. The Court will thus need to engage in a review of factual findings of the court of appeals that the statistics were significant enough to make out a *prima facie* case. More important, since the court of appeals has remanded this case for the taking of further evidence, it is in an interlocutory stage with an incomplete record and

may ultimately become moot if the petitioner prevails on remand.

Finally, petitioner has manufactured conflicts among the circuit courts on both issues he presents. A review of the contrary cases cited by the petitioner demonstrates that each case turns on its facts and has no factual analogy with this case.

STATEMENT OF FACTS

1. Promotion Procedures

Respondent, a Postal Service employee since 1962, had been the postmaster of the Kennilworth, Illinois Post Office since 1964 at a salary level of PES 18. Pretrial Order Statement of Uncontested Facts (A.F.) No. 1. In 1977, she applied for promotion to three postmaster positions at larger post offices in Palatine, Glenview and Franklin Park, each of which commanded a higher PES 22 salary level. A.F. No. 22, App. 17a-18a.

The procedures for promotion are contained in the Postal Service *Personnel Handbook*, P-11, TL-4, and management received instructions on these procedures. Included in these instructions was a guide to promotion and reassignment. Pl. Exh. No. 23 at 17; Tr. 54-55, 75, 131-133; *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981). A Postmaster Screening Board (the Board) is set up in accordance with these guidelines to review applicants for postmaster positions. This Board is composed of four persons, two directors from other Postal Service districts and two postmasters. App. 19a, Pl. Exh. No. 23, Tr. 117-118, 130-33, 319, 375.

This Board in the first instance reviews the qualifications of the applicants for promotion. Tr. 54. A Board member must be at least at the PES level for the position vacancy being considered. Because there were no females in management above PES 20 level, none were or could have been on the Board considering the three PES

22 postmaster positions for which the respondent applied. Tr. 55, App. 19a.

The Board was to review certain forms and documents relating to the candidates and then score each applicant. The score of each individual Board member was to be added up, and the candidates were then ranked on the basis of the total points received. App. 19a-21a.

There were a number of standardized Postal Service forms the Board reviewed. First was the applicant's "Personal History Summary" or Form No. 991, Pl. Exh. No. 23, 33, Tr. 57, which contained the applicant's education background, Postal Service courses taken and employment experience. *Id.*; Tr. 56. Another form reviewed was the "Estimate of Potential," known as Form No. 2577, prepared by the immediate supervisor of the candidate. Part A of the Form No. 2577, entitled "Potential Ability," lists five subject areas to be rated and nine categories of ratings. *Id.*; App. 19a-21a.

Another form is the five page "Analysis of Experience, Background and Potential", Pl. Exh. No. 33, which requires answers with specific data to questions regarding labor relations, equal employment opportunity, decision making, problem solving, budget operations, employee development, supervision of branch operations, planning and scheduling of work, safety and health, customer and community relations, and the amount of unused sick leave. *Id.*

The Board members testifying at trial stated they relied on extensive statistical data on the operations of the post offices managed by each applicant. Such data on budgets, routes and delivery systems, hours of work of employees, time for deliveries, equipment used and other services of the post offices of applicants were considered. Numerous exhibits with these statistics were admitted on these points. Tr. 65-73, 107-112, 136-140, Jt. Exh.24, Pl. Exh. No. 12, 23, Def. Exh. No. 1-5, 94-95.

Each Board member after reviewing these forms gave

a grade to each candidate. The scoring systems was as follows:

Outstanding candidate:	8-7
Very good candidate:	6-5
Acceptable candidate:	4-3

The scores of each member were then totalled and all those who received a score of 20 and above were found qualified and referred for further review by the Regional Management Selection Board, which then made a recommendation to the Postmaster General. App. 21a. This process was standardized for all promotions. A standardized report was prepared by the panel stating the results, ranking of candidates, and the reasons for rejection of those not referred further. Jt. Exh. 3-7; 9-12, 14-17, 19-20, 26; Def. Exh. No. 7-12; 96-98.

Respondent scored less than 20 and was thus eliminated from further consideration. Of the applicants for each of the three vacancies, respondent was the only female. For the Glenview position she ranked 13 out of 32; for Palatine, she ranked 16 of 32 applicants; for Franklin Park, she ranked 15 out of 28. App. 21a-22a.

The petitioner has a policy of promoting from within, rather than hiring for higher level positions, and experience and training within the Postal Service are key to promotion. App. 19a; Tr. 49-53. Since there are no special qualifications for higher level postmaster positions, the primary reason given by Board members for determining the relative qualifications of candidates was their experience as a postmaster in a large post office or in the Officer in Charge (OIC) program, which offered postmasters direct training for higher level postmaster work. Jt. Exh. No. 7, 14, 17; Def. Exh. No. 7-12, 96-98. Pl. Exh. No. 23 at 6, 14-20, Tr. 338-342, 348-9, 70, 305-08, 294-95, 297,400. Female employees were un-

derrepresented in receiving OIC experience; for the year prior to the promotions in issue, less than 10% of OIC assignments were held by women even though they held 21% of the postmaster positions. Pl. Exh. No. 23 at 14-18; Def. Exh. No. 104.

2. Petitioner's Contentions in the District Court.

Although the petitioner in this Court characterizes the promotion procedures just described as "subjective," this was not his argument in the trial court. Quite the contrary, at virtually every stage of the trial, counsel for petitioner argued that the promotion procedures were, in fact, objective. In his opening statement, counsel asserted that the three forms and other materials used by the Board were objective and essentially statistical. Tr. 21-25, 28-30. At a later stage in the trial, in a colloquy with the Court, counsel argued that the forms were objective and based on "measurable objective data," and the evaluation by the panel itself was "objective." Tr. 171-75. In closing argument, counsel repeated that the promotion procedures "were in fact objective and demonstrated to be so," Tr. 418, 427, and that the materials used were "not subjective." Tr. 174-76. In his trial brief, the petitioner, contrary to the position he now asserts, Pet. at 11-12, argued that the forms used by the panel "are sexually neutral in their potential effect . . . " Pretrial Brief at 9.

The district court, in holding that these promotion procedures may be considered under a disparate impact test, found that they had "both objective and subjective parts," App. at 35a, and that "[w]hile most of the material relied upon by the screeners was subjectively derived, the Screening Board made an effort to objectify its decision." App. at 42a. Petitioner did not challenge any of these findings on appeal. Because these findings were not in issue on appeal, the court of appeals did not discuss in its opinion the question of the applicability of disparate impact analysis to subjective decision making.

3. Statistics

Respondent presented at trial statistics demonstrating that the promotion procedures restricted females in the North Suburban MSC (the area covering the Northern District of Illinois) and nationally to PES 18 level and below. In the North Suburban MSC, women held 21% of the postmaster positions, yet none was rated over a PES 20, and more than 65% of the female postmasters were PES 15 and below. Only 5% of those over PES 19 were female. Nonetheless, women held 29%of the total positions in the North Suburban MSC at that time. While men comprised approximately 70% of the work force, 95% of those over PES 19 were male. App. 24a.

Nationally, female underrepresentation in the upper level PES positions mirrored that in the North Suburban MSC. Although females comprised approximately 21% of the national workforce, they held only 11.5% of the PES 15 and above positions. App. 24a. Men were eight times more likely than women to be promoted to PES 19 positions and above. P1. Exh. No. 23 at 13.

A report circulated to petitioner's employees by the Postmaster General of the United States stated that "white males had . . .three times greater success than women" in attaining high level positions. The report detailed underrepresentation of females in all of the upper level positions of the Postal Service, and concluded that there was serious discrimination against women. P1. Exh. No. 48 at 2.

The Postal Service presented no other statistics on the promotions or PES levels of females, nor any other evidence seeking to explain or refute the statistics which the respondent presented. In answers to interrogatories after remand, petitioner admitted that because "men tended to be found in proportionately greater numbers in supervisory and managerial positions than women . . . they would gain the experience necessary for advancement to higher-level positions in proportionately greater numbers

than women." Resp. to Interrogatories 3 *et seq.* at 2.

The district court found that, although "[g]rossly, the disparities could be significant," App. 37a, respondent had not made a *prima facie* case because she presented no applicant flow statistics. *Id.*

The court of appeals, in reversing the holding that the respondent failed to present a *prima facie* case, found that the lack of applicant flow data does not itself render her case fatal. In light of settled law from this Court as well as other circuits that underrepresentation statistics may be used in a Title VII case, the court held that since the petitioner promotes from within, the disparities presented by respondent were significant enough to establish a *prima facie* case. App. 5a-8a.

The panel explained that the petitioner was free on remand to present more refined statistics or evidence that females in lower level postmaster positions generally did not apply or were not qualified for upper level jobs, or it could demonstrate that the promotion procedures were job related. App. 7a-8a.

On remand from the court of appeals, the petitioner has sought stays of the proceedings, but those motions have been denied by the district court. A date for further hearings below has not been set.

REASONS FOR DENYING THE PETITION

1. The Petition Requires the Court to Review Evidence and the Findings of the District Court.

Certiorari should be denied when the issue presented for review turns on an analysis of specific evidence and will require the Court to review findings of fact by the district court. This Court has stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925); *see, Texas v. Mead,* 465 U.S. 1041 (1984) (Opinion of Justice

Stevens). In the instant case, the petitioner asks that the Court not only to review specific findings of fact, but to reverse findings which were not even challenged in the court of appeals.

Although the petitioner urges the Court to decide whether a disparate impact analysis applies to subjective decision making, the record contains substantial evidence that the promotion procedures were, in fact, objective. This was the position asserted by the petitioner himself in the trial court. The district court as a result found that the procedures were in part objective and that the raters sought to objectify their decision-making. The petitioner did not appeal this finding in the court of appeals.

The record amply demonstrates that the promotion procedures and the criteria considered by Board members were, in fact, objective. The four member all male panel, some of whom were not familiar with candidates, reviewed standardized forms which contained, in part, scores for certain categories of performance, and also contained substantial statistical data on the candidates and the operation of the post offices managed by them. After review of that data, Board members individually applied a scoring system of 3 through 8; the candidates were then ranked on the basis of the total scores, and a cut-off score of 20 was made.

In addition, each Board member who testified stated that the most important basis for his grades was the objective criteria of the type of prior experience and training of the Candidate. A candidate was given greater weight who had experience managing a large post office or had OIC experience. Because females were postmasters at lower PES levels and were not given a sufficient number of OIC training assignments, they did not possess as much managerial experience as men. Petitioner admitted that the failure of females to receive these managerial assignments caused their disproportionately low success rate in promotions to

higher level PES postmaster positions.

The record does not support the factual premise underlying petitioner's claim for certiorari that the procedures challenged by the respondent were, in fact, subjective. Thus, the issue presented by petitioner would require this Court to review the record and reverse findings of fact that the procedures at issue were objective before even reaching the broader legal issue presented by the petitioner.

With respect to the statistical issue, the petitioner likewise requests the Court to weigh evidence and overturn the court of appeal's finding that the respondent's statistics make out a *prima facie* case. Petitioner appears not to attack the use of workforce statistics as such, but the probative value of the statistics presented in this case. This Court has held in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), however, that a plaintiff in a Title VII case may use workforce underrepresentation statistics to prove a case, and that an evaluation of statistical evidence "depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324,340 (1977). Thus, a review of petitioner's argument would require the Court to weigh and discuss the statistical findings in light of the entire record.

2. Petitioner's Present Assertion that the Promotion Procedures Were Subjective Contradicts His Position in the District Court.

Although the petitioner now bases his certiorari petition on the fact that the procedures were subjective, he consistently asserted in the district court that the procedures were objective and urged the court to make such findings. After the court entered such findings, the petitioner did not claim in the court of appeals that such findings were clearly erroneous. Petitioner should not now be permitted to argue a position directly contrary to the one he asserted below.

In his opening statement and throughout trial, counsel argued at great length that the forms used and the procedures of the Board were objective and that the promotion decisions were based in large part on statistics and measurable objective data. In closing, the petitioner argued that the promotion procedures were "in fact objective and demonstrated to be so." Tr. 418. Each witness produced by the petitioner testified that his decision was entirely objective and based on objective data, including the extent of the candidate's experience in managing larger post offices or in prior OIC experience. Even in his trial brief, the petitioner claimed that the promotion procedures were neutral in their potential impact.

Petitioner should not be permitted at this point to change his position and create a fictional legal issue for this Court to consider.

3. The Petition Seeks Review of an Interlocutory Order.

This Court has explained that certiorari should not be granted until a final decree is issued unless it is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & R, Co.*, 148 U.S. 372,384 (1893). Lack of finality may "of itself" furnish "sufficient ground for denial of the application." *Hamilton-Brown Shoe co. v. Wolf Bros. & Co.*, 240 U.S. 251,258 (1916); *Firemen v. Bangor & Aroonstock R. Co.*, 389 U.S. 327,328 (1967).

The court of appeals remanded the case for further evidence and findings by the district court. The court stated, App. at 7a-8a, that petitioner has the opportunity to demonstrate the essential subjectivity of the promotion procedures. In addition, with respect to the statistics, the court of appeals did not close the record on the issue. Its limited holding was that the respondent had merely presented a *prima facie* case. On remand, the petitioner

will be free to demonstrate the lack of probative value of the statistics. Petitioner may do so by demonstrating that during the period covered by the statistics, females either did not apply for upper level positions or did not possess the qualifications for those positions. It would be premature for this Court to review the statistics before the record has been fully developed on the issue.

It is quite possible that the petitioner will yet win this case. Certainly, after a further trial, the record will be more developed on factual issues which the petitioner requests this Court to consider now. The petitioner has not demonstrated there will be any extraordinary inconvenience or embarrassment or any dire consequences at all if this Court defers review of this case until the record is further developed and a final judgment is entered. At this interlocutory stage, the case is not ripe for this Court's review.

4. There is No Conflict Among the Circuit Courts.

Rule 17(a) of this Court provides that certiorari may be granted "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." While the petitioner has cited a number of decisions of courts of appeals purportedly in conflict with each other, none involves promotion procedures similar to the ones here. There is thus no conflict among the circuits on the same matter raised in the certiorari petition.

There are, however, two other courts of appeals which have considered Postal Service promotion procedures virtually identical to those here, and in both cases, the courts allowed a disparate impact analysis. In *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985) [1], a black Postal Service employee sought promotion to a PES

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[1] Petitioner did not cite this case in its petition.

20 position. The procedures were the same as in this case: a board reviewed the applications and then prepared a list of those found qualified which it submitted to the selecting supervisor who then chose the candidate to be promoted. The Postal Service argued in that case, as here, that a disparate impact analysis should not apply to the promotion procedures since they were subjective in nature. The court of appeals rejected that argument and held that a disparate impact claim can be made.

Similarly, another case against the Postal Service, *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), also squarely holds that subjective promotion procedures are subject to disparate impact analysis. The procedures in *Griffin* utilized by the Postal Service were similar to the ones in issue, and consisted of a review by a panel.

The numerous cases cited by the petitioner which he claims conflict with this one (Pet. at 8-10) all involve completely different employment decisions and are not factually similar to this one. Some of the cases cited by petitioner involve decisions made by an individual supervisor to terminate, demote or not to promote a particular individual.[2] In none of those cases was the supervisor evaluating other candidates for their relative qualifications with each other; each case involved an *ad hoc* decision by one supervisor to take a specific action with respect to one employee. In the instant case, a four member board, rely-

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[2] *Robinson v. Polaroid Corp.*, 732 F.2d 1010 (1st Cir. 1984) (individual decision to terminate); *Pegues v. Mississippi StateEmployment Service*, 699 F.2d 760 (5th Cir.), cert. denied, 464 U.S. 991 (1983) (discretion by individual interviewer to promote); *Coates v. Johnson & Johnson Co.*, 756 F.2d 524 (7th Cir. 1985) (individual decisions to terminate); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981) (individual decision to terminate; no specific employment practice identified); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120 (9th

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ing on standardized forms with grades and statistical data, gave numerical ratings and then ranked 32 competing candidates. This was not an *ad hoc* decision by one supervisor involving one employee.

In the remaining cases cited by the petitioner, the courts held that no specific employment practice had been identified by the plaintiff.[3] In this case, however, the respondent identified the employment practices—the review by the Board of the forms and grades and its subsequent scoring and ranking of candidates. The record also demonstrates that the objective fact of the lack of postmaster experience in larger offices and of OIC experience was the basis for the disparate impact. Thus, none of the cases cited by petitioner are in conflict with this one or involve issues arising in this case.

Another important factor which distinguishes this case from the others cited is that the petitioner is a federal employer subject to Equal Employment Commission Uniform Guidelines on Employee Selection Procedures (EEOC Guidelines), 29 C.F.R. Pt. 1607 *et seq.* Unlike the private employers in the circuit court cases cited by the

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2 *(Continued)*

Cir. 1985) (individualized hiring and promotion claims; court also states that specific practice is not identified). Co.

[3] *EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), rev'd on other grounds *sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Stasny v. Southern Bell Telephone & Telegraph Co.* , 628 F.2d 267 (4th Cir. 1980); *Latino Unidos v. Secretary of HUD*, 41 Fair Empl. Prac. Cas. (BNA) 839 (1st Cir. 1986); *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir. 1982); *Taylor v. Teletype Corp.*, 648 F.2d 1129 (8th Cir.), cert. denied, 454 U.S. 969 (1981) (unclear from the opinion whether procedure was identified; disparate impact theory not advanced in the district court); *Tally v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984);

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petitioner, the Postal Service as a federal agency is bound by the EEOC Guidelines under §717 (b) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16(b). *See also,* 29 C.F.R. §1607.2 ("These quidelines will be applied ... by the Civil Service Commission and other Federal agencies subject to Section 717 of Title VII ...")

These Guidelines, at §1607.16Q, allow a disparate impact analysis of "*[a]ny* measure, combination of measures or procedures cited as a basis for any employment decision ... [and] include the full range of assessment techniques from traditional paper and pencil tests, training programs or probationary periods and physical, education, and work experience requirements through informal or casual interviews and unscored application forms." *Emphasis added.* The Guidelines also apply to "interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance." EEOC Questions and Answers, Vol. 2, *Employment Practices Guide* (CCH) p. 2253-8.

Thus, the EEOC Guidelines' specific application to all procedures, whether objective or subjective, is binding on this employer, regardless of circuit courts which have held that a disparate impact analysis does not apply to subjective procedures of private employers. For this reason, those decisions cited by petitioner,[4] since they involve private employers, are not analogous and are thus irrelevant.

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3 *(Continued)*

Mortensen v. Callaway,, 672 F.2d 822 (10th Cir. 1982), (unclear from the opinion whether a specific procedure was identified); *but see, Rossini v. Ogilvy & Mather, Inc.,* No. 85-7776 (2d Cir. 1986) (appears to hold that plaintiff cannot challenge the impact of a performance evaluation system; however, plaintiff did not try the case under a disparate impact theory.)

[4] Although *Tally v. United States Postal Service,* 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984), involved the

(Footnote continued on the following page)

For the reasons stated above, there is no conflict among the circuit courts regarding the first issue for review raised by the petitioner.

Neither is there a conflict among the circuit courts on the question whether workforce underrepresentation statistics may be used to establish a *prima facie* case in a promotion challenge when the employer promotes from within. Although the petitioner cites five cases which it claims conflict with the decision below, the cases, in fact, do not stand for the proposition asserted by the petitioner. Those cases are *EEOC v. Radiator Specialty Co,* 610 F.2d 178 (4th Cir. 1979); *EEOC v. Chesapeake & Ohio Railway,* 577 F.2d 229 (4th Cir. 1978); *Metrocare v. Washington Metropolitan Area Transit Authority,* 679 F.2d 922 (D.C. Cir. 1982); *Ste. Marie v. Eastern R. Ass'n.,* 650 F.2d 395 (2d Cir. 1981); *Rivera v. City of Wichita Falls,* 665 F.2d 531 (5th Cir. 1982).

The law is settled that when an employer promotes from within, statistics demonstrating the absence of minority employees in upper level positions in comparison to their presence in the workforce are relevant and can create a *prima facie* case. *Mozee v. Jeffboat,* 746 F.2d 365 (7th Cir. 1984), *Clark v. Chrysler,* 673 F.2d 921, 927 (7th Cir. 1982) cert. denied, 459 U.S. 873 (1982); *Fisher v. Proctor & Gamble Mfg.,* 613 F.2d 527, 544 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981); *Paxton v. Union National Bank,* 688 F.2d 552,563-64 (8th Cir. 1982, cert. denied, 460 U.S. 1083 (1983);

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4 *(Continued)*

same employer, the plaintiff had failed to point to an employment practice and instead engaged in a wide-ranging attack on the fact that black females were discharged. The EEOC Guidelines discussed herein thus had no application to that case since the issue of whether a disparate impact analysis applies to a subjective employment practice, even if identified, was not reached.

Davis v. Califano, 613 F.2d 957, 964-65 (D.C. Cir. 1979); *Chrisner v. Complete Auto Trans. Inc.,* 645 F.2d 1251, 1259 (6th Cir. 1981).

In fact, in the two cases evaluating virtually identical promotion procedures used by the Postal Service, both the Tenth and Eleventh Circuits held that similar workforce statistics of underrepresentation in the upper level jobs in the Postal Service presented a *prima facie* case under Title VII. *Hawkins v. Bounds,* 752 F.2d 500 (10th Cir. 1985); *Griffin v. Carlin,* 755 F.2d 1516 (11th Cir 1985).

In four of the cases cited by the petitioner in which he claims a conflict exists, the courts' decisions turned on the fact that there were special qualifications for the higher level positions in issue, and therefore workforce underrepresentation statistics were not probative of discrimination since persons in the general workforce did not possess those special qualifications. *EEOC v. Radiator Specialty Co.,* 610 F.2d 178 (4th Dist. 1979); *EEOC v. Chesapeake & Ohio Railway,* 577 F.2d 229 (4th Cir. 1978); *Metrocare v. Washington Metropolitan Area Transit Authority,* 679 F.2d 922 (D.C. Cir. 1982); *Ste. Marie v. Eastern R. Ass'n.* , 650 F.2d 395 (2d Cir. 1981). In the instant case, there is no evidence that PES 20 and above postmaster positions require special qualifications, and , in fact, the record indicates otherwise. All of the applicants are postmasters. A number of Board members made clear in their testimony that the primary criteria in their review of these postmasters was not the presence of special qualifications for the higher PES level positions, but their breadth of experience as a postmaster or in the OIC training program. P1. Exh. No. 23 at 14-18. Tr. 70, 74-78, 294-297, 305-308, 342, 348-9, 400, Jt. Exh. No. 7, 14, 17; Def. Exh. No. 7-12, 96-98.

In the other case cited by the petitioner, the court made clear that workforce underrepresentation statis-

tics could be used, but rejected those statistics upon weighing them in light of the entire record after a full trial. *Rivera v. City of Wichita Falls,* 665 F.2d 531 (5th Cir. 1982). Here, the court of appeals has remanded for a full trial.

No conflict exists with respect to the issue of statistics.

CONCLUSION

Respondent respectfully requests the Court to deny the petition for a writ of certiorari.

Respectfully Submitted,

STEPHEN G. SELIGER
180 N. LaSalle Street
Suite 1101
Chicago, IL 60601
(312) 346-5255